

# Rules and Regulations

Federal Register

Vol. 73, No. 245

Friday, December 19, 2008

This section of the FEDERAL REGISTER contains regulatory documents having general applicability and legal effect, most of which are keyed to and codified in the Code of Federal Regulations, which is published under 50 titles pursuant to 44 U.S.C. 1510.

The Code of Federal Regulations is sold by the Superintendent of Documents. Prices of new books are listed in the first FEDERAL REGISTER issue of each week.

## DEPARTMENT OF HOMELAND SECURITY

### 8 CFR Parts 215 and 235

[DHS–2005–0037]

RIN 1601–AA35; RIN 1600–AA00

#### United States Visitor and Immigrant Status Indicator Technology Program (“US–VISIT”); Enrollment of Additional Aliens in US–VISIT; Authority To Collect Biometric Data From Additional Travelers and Expansion to the 50 Most Highly Trafficked Land Border Ports of Entry

**AGENCY:** National Protection and Programs Directorate, DHS.

**ACTION:** Final rule.

**SUMMARY:** The Department of Homeland Security (DHS) established the United States Visitor and Immigrant Status Indicator Technology Program (US–VISIT) in 2003 to verify the identities and travel documents of aliens. Aliens subject to US–VISIT may be required to provide fingerprints, photographs, or other biometric identifiers upon arrival at the United States. Currently, aliens arriving at a United States port of entry with a nonimmigrant visa, or those traveling without a visa as part of the Visa Waiver Program, are subject to US–VISIT requirements with certain limited exceptions. This final rule expands the population of aliens who will be subject to US–VISIT requirements to nearly all aliens, including lawful permanent residents. Exceptions include Canadian citizens seeking short-term admission for business or pleasure under B visas and individuals traveling on A and G visas, among others.

On August 31, 2004, the Department promulgated an interim final rule that expanded the US–VISIT program to include aliens seeking admission under the Visa Waiver Program and travelers arriving at designated land border ports

of entry. This rule also finalizes that interim final rule and addresses public comments received during that rulemaking action.

**DATES:** This final rule is effective January 18, 2009.

**FOR FURTHER INFORMATION, CONTACT:** Helen deThomas, Senior Policy Analyst, US–VISIT, Department of Homeland Security, 1616 Fort Myer Drive, 18th Floor, Arlington, Virginia 22209, (202) 298–5200.

#### SUPPLEMENTARY INFORMATION:

##### Table of Contents

- I. Background
  - A. Program Development
  - B. Program Operation
  - C. Notice of Proposed Rulemaking
- II. Comments on the Notice of Proposed Rulemaking
  - A. Status of LPRs in US–VISIT
    - 1. Past Security Checks
    - 2. Relationship to United States Citizens
    - 3. Relationship to Canadian Citizens
    - 4. Travel Concerns in United States Air and Sea Ports
    - 5. Travel Concerns at Land Border Inspections
    - 6. Privacy Concerns of LPRs
    - 7. Ten-Print Enrollment
  - B. Canadian Citizens
    - 1. Western Hemisphere Travel Initiative
    - 2. Preclearance Sites in Canada
    - 3. Canadians Requiring a Waiver of Inadmissibility
    - 4. Canadians in Transit through the United States
    - 5. Crew Members
  - C. Mexican Citizens
  - D. Operational Issues
    - 1. Clarification of Procedures for Returning Nonimmigrants
    - 2. REAL ID Act of 2005
    - 3. Advance Passenger Information System
    - 4. Connection to IDENT/IAFIS Interoperability
    - 5. Biometric Identifiers
    - 6. Age Restrictions
    - 7. Exemption of Individual Aliens
  - E. Privacy and Information Retention
  - F. International Conventions
  - G. United States Citizen Voluntary Enrollment
  - H. Economic Impact
  - I. Attorney Representation
  - J. Pacific Rim Issues
- III. Comments on the August 31, 2004 Interim Rule
  - A. General
  - B. Outreach to the Affected Public
  - C. Use of Interim Rules
  - D. Facilities
  - E. Interaction With Existing Programs
  - G. Travel and Delays
  - H. Health Risks
  - I. Program Exemptions

- J. Privacy
- K. Fees
- IV. Statutory and Regulatory Review
  - A. Regulatory Flexibility Act
  - B. Executive Order 12866—Regulatory Planning and Review
  - C. Executive Order 13132—Federalism
  - D. Unfunded Mandates Reform Act
  - E. Small Business Regulatory Enforcement and Fairness Act
  - F. Trade Impact Assessment
  - G. National Environmental Policy Act
  - H. Paperwork Reduction Act
  - I. Public Privacy Interests

#### I. Background

##### A. Program Development

The Department of Homeland Security (DHS) established the United States Visitor and Immigrant Status Indicator Technology Program (US–VISIT) in accordance with several statutory mandates that collectively require DHS to create an integrated, automated biometric entry and exit system that records the arrival and departure of aliens; biometrically compares the identities of aliens; and authenticates travel documents presented by such aliens through the comparison of biometric identifiers. Aliens subject to US–VISIT may be required to provide fingerprints, photographs, or other biometric identifiers upon arrival in, or departure from, the United States. DHS views US–VISIT as a biometrically-driven program designed to enhance the security of United States citizens and visitors, while expediting legitimate travel and trade, ensuring the integrity of the immigration system, and protecting the privacy of our visitors’ personal information.

The statutes that authorize DHS to establish US–VISIT include, but are not limited to:

- Section 2(a) of the Immigration and Naturalization Service Data Management Improvement Act of 2000 (DMIA), Public Law 106–215, 114 Stat. 337 (June 15, 2000);
- Section 205 of the Visa Waiver Permanent Program Act of 2000, Public Law 106–396, 114 Stat. 1637, 1641 (Oct. 30, 2000);
- Section 414 of the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (USA PATRIOT Act), Public Law 107–56, 115 Stat. 271, 353 (Oct. 26, 2001);
- Section 302 of the Enhanced Border Security and Visa Entry Reform Act of

2002 (Border Security Act) Public Law 107-173, 116 Stat. 543, 552 (May 14, 2002);

- Section 7208 of the Intelligence Reform and Terrorism Prevention Act of 2004 (IRTPA), Public Law 108-458, 118 Stat. 3638, 3817 (December 17, 2004); and

- Section 711 of the Implementing Recommendations of the 9/11 Commission Act of 2007, Public Law 110-52, 121 Stat. 266 (Aug. 3, 2007).

DHS provided detailed abstracts of the particular sections of the statutes that established and authorized the US-VISIT program in prior rulemakings and the proposed rule. See 69 FR 468 (Jan. 5, 2004); 69 FR 53318 (Aug. 31, 2004); 71 FR 42605 (July 27, 2006); 73 FR 22065 (Apr. 24, 2008).

On January 5, 2004, DHS implemented the first phase of the US-VISIT biometric component by publishing an interim final rule in the **Federal Register** providing that aliens seeking admission into the United States through nonimmigrant visas must provide fingerprints, photographs, or other biometric identifiers upon arrival in, or departure from, the United States at air and sea ports of entry. 69 FR 468 (Jan. 5, 2004). Effective September 30, 2004, nonimmigrants seeking to enter the United States without visas under the Visa Waiver Program (VWP)<sup>1</sup> also are required to provide biometric information to US-VISIT. 69 FR 53318 (Aug. 31, 2004). US-VISIT is now operational for entry at 115 airports, 15 seaports, and 154 land border ports of entry. The following categories of aliens currently are expressly exempt from US-VISIT requirements by DHS regulations:

- Aliens admitted on an A-1, A-2, C-3 (except for attendants, servants, or personal employees of accredited officials), G-1, G-2, G-3, G-4, NATO-1, NATO-2, NATO-3, NATO-4, NATO-5, or NATO-6 visa;
- Children under the age of 14;
- Persons over the age of 79;
- Taiwan officials admitted on an E-1 visa and members of their immediate families admitted on E-1 visas.

<sup>1</sup> Pursuant to section 217 of the Immigration and Nationality Act (INA), 8 U.S.C. 1187, the Secretary of Homeland Security (the Secretary), in consultation with the Secretary of State, may designate certain countries as Visa Waiver Program (VWP) countries if certain requirements are met. Citizens and eligible nationals of VWP countries may apply for admission to the United States at a U.S. port of entry as nonimmigrant aliens for a period of ninety (90) days or less for business or pleasure without first obtaining a nonimmigrant visa, provided that they are otherwise eligible for admission under applicable statutory and regulatory requirements. The list of countries which currently are eligible to participate in VWP is set forth in 8 CFR 217.2(a).

8 CFR 235.1(f)(1)(iv).<sup>2</sup> In addition, the Secretary of State and Secretary of Homeland Security may jointly exempt classes of aliens from US-VISIT. The Secretaries of State and Homeland Security, as well as the Director of the Central Intelligence Agency, also may exempt any individual from US-VISIT. 8 CFR 235.1(f)(1)(iv)(B).

### B. Program Operation

The US-VISIT program, through U.S. Customs and Border Protection (CBP) officers, collects biometrics (digital fingerprints and photographs) from aliens seeking admission to the United States. 73 FR 22066. The US-VISIT program also receives biometric data collected by Department of State (DOS) consular offices in the visa application process. DHS checks biometric data on those applying for admission to the United States against government databases to identify suspected terrorists, known criminals, or individuals who have previously violated U.S. immigration laws. These procedures assist DHS in determining whether an alien seeking to enter the United States is, in fact, admissible to the United States under existing law. Biometric data collected by US-VISIT assists DOS consular officers in the verification of the identity of a visa applicant and the determination of the applicant's eligibility for a visa. DHS's ability to establish and verify the identity of an alien and to determine whether that alien is admissible to the United States is critical to the security of the United States and the enforcement of the laws of the United States. By linking the alien's biometric information with the alien's travel documents, DHS reduces the likelihood that another individual could assume the identity of an alien already recorded in US-VISIT or use an existing recorded identity to gain admission to the United States.

From its inception on January 5, 2004 to the present, US-VISIT has biometrically screened more than 130 million aliens at the time they applied for admission to the United States. DHS has taken adverse action against more than 3,800 aliens based on information obtained through the US-VISIT biometric screening process. By "adverse action," DHS means that the alien was:

- Arrested pursuant to a criminal arrest warrant;

<sup>2</sup> Effective January 23, 2007, 8 CFR 235(d)(1)(iv) was redesignated as 8 CFR 235.1(f)(1)(iv). 71 FR 68412 (Nov. 24, 2006).

- Denied admission, placed in expedited removal, or returned to the country of last departure; or
- Otherwise detained and denied admission to the United States.

In addition, by quickly verifying identity and validity of documents, US-VISIT has expedited the travel of millions of legitimate entrants. Expanding the population of aliens required subject to US-VISIT requirements will allow DHS to identify additional aliens who are inadmissible or who otherwise may present security and criminal threats, including those who may be traveling improperly on previously established identities.

### C. Notice of Proposed Rulemaking

On July 27, 2006, DHS published a notice of proposed rulemaking (NPRM or proposed rule) proposing to expand the population of aliens subject to US-VISIT requirements. The NPRM proposed to require enrollment of any alien in US-VISIT, with the exception of those Canadian citizens applying for admission as B-1/B-2 visitors for business or pleasure, and those specifically exempted under DHS regulations. Under the proposed rule, the following classes of aliens, among others, would become subject to US-VISIT requirements:

- Lawful Permanent Residents (LPRs).<sup>3</sup>
- Aliens seeking admission on immigrant visas.
- Refugees and asylees.
- Certain Canadian citizens who receive a Form I-94 at inspection or who require a waiver of inadmissibility.
- Aliens paroled into the United States.
- Aliens applying for admission under the Guam Visa Waiver Program.

DHS received 69 comments on the 2004 interim final rule during the 30-day notice and comment period. DHS has considered the comments received in the development of this final rule. This final rule adopts the proposed rule without change.

This rule also addresses comments received on the August 31, 2004, interim final rule and finalizes that rule. For ease of reference, DHS responds separately to the comments submitted on the interim rule and the proposed rule.

<sup>3</sup> The authorizing statutes, which all refer to "aliens" without differentiation, support the inclusion of lawful permanent residents (LPRs) into the US-VISIT program. See section 101(a)(3) of the Immigration and Nationality Act of 1952, as amended, 8 U.S.C. 1101(a)(3) ("The term 'alien' means any person not a citizen or national of the United States").

## II. Comments on the Notice of Proposed Rulemaking

DHS received 71 comments on the July 27, 2006, notice of proposed rulemaking. Some comments were positive, while other comments were negative or asked that the regulation be withdrawn. The comments raised a number of issues, including the relationship with other DHS initiatives, suggesting that US-VISIT should not proceed until other initiatives have been completed. One commenter noted that there have been several GAO reports that have been critical of US-VISIT and DHS has addressed those concerns as discussed in the published reports. DHS continues to address all of these concerns and recommendations as US-VISIT is developed. The most common issue raised by the comments was the inclusion of lawful permanent residents (LPRs) in US-VISIT enrollment and verification.

Some comments were very general, such as those suggesting that DHS concentrate on removing illegal aliens present in the United States. DHS believes that US-VISIT plays an important role in preventing illegal immigration in the first place by requiring biometric information from travelers seeking to enter the United States. DHS continues to concentrate on intercepting aliens who are in the United States without authorization. These priorities do not conflict.

Similarly, a commenter asked how DHS is benchmarking or measuring the success of US-VISIT. DHS provides performance measures to the Executive Office of the President and to the Office of Management and Budget (OMB) using OMB's Program Assessment Rating Tool (PART). Some of the factors included in the Fiscal Year (FY) 2006 PART assessment were: Cumulative and annual percentage baseline cost and schedule overrun on US-VISIT Increment Development and Deployment, Reduction in Review Time for Privacy Redress, Ratio of Adverse Actions to Total Biometric Watch List Hits at Ports of Entry, Percentage of Exit Records Matched to Entry Records, and other factors. OMB rated US-VISIT as "moderately effective." DHS accepts OMB's view on these performance measures and is taking steps to achieve better results. The comment, however, does not raise issues relating to the proposed rule.

### A. Status of LPRs in US-VISIT

#### 1. Past Security Checks

Thirty-two commenters urged that LPRs be exempt from US-VISIT, based on their status as LPRs, because they

have previously been subject to significant security checks in order to obtain LPR status. Similarly, some commenters stated that there is no evidence that LPRs pose a threat to the level that they "should be grouped with" nonimmigrants who are subject to US-VISIT. One commenter stated that DHS has a flawed process in that it is willing to trust in an LPR's first use of US-VISIT for initial capture of fingerprints, rather than compare against the records captured during the initial adjustment of status process.

DHS agrees that LPRs receive an extensive background check to become LPRs, including a criminal background check using the applicant's fingerprints. United States Citizenship and Immigration Services (USCIS) conducts an extensive investigation prior to granting adjustment of status to that of an LPR, and the DOS undertakes significant investigation of an alien applying for an immigrant visa. Also, DHS agrees that there is not necessarily evidence to support the notion that LPRs—as a class—pose risks not posed by nonimmigrants—as a class.

DHS does not, however, believe that this point is entirely relevant for the purposes of this rule for several significant reasons. DHS and DOJ continue to uncover significant immigration document fraud, particularly in relation to permanent resident cards (Form I-551). Common examples include giving or selling a permanent resident card to someone else, altering a lost permanent resident card, and using a fraudulently created permanent resident card. DHS has substantially increased the security features on permanent resident cards in recent years, but security features are not foolproof.

The Immigration and Naturalization Service (INS), predecessor to a number of DHS functions, issued resident alien cards without expiration dates until 1989. Permanent resident cards issued after 1989 are valid only for ten years. Additionally, INS upgraded the Form I-551 significantly, including more secure features, in September 1997. 62 FR 44146 (Aug. 19, 1997). Many LPRs possess permanent resident cards that have limited security features and no expiration date. Trafficking in these cards is inhibited by the fact that the card must appear to be aged to the date of its issue, but otherwise these cards provide limited security from assumed identity. DHS is taking steps to recall all such cards. 72 FR 46922 (Aug. 22, 2007).

Including LPRs within the scope of US-VISIT processing will enable DHS to detect, deter, and act against those

who attempt fraud through the biometric match of the person presenting the Form I-551 against the record of the person to whom that card was issued. Accordingly, the inclusion of LPRs within US-VISIT is consistent with other security programs initiated by DHS.

LPRs are still subject to entry, documentation, and removability requirements to the United States. LPRs are aliens. See sections 101, 212, 237 of the INA (8 U.S.C. 1101, 1182, 1227) and 8 CFR 235.1(b), (f)(1)(i). Although LPRs are not technically regarded as seeking admission to the United States if they are returning from a stay of less than 180 days under section 101(a)(13)(C)(ii) of the INA (8 U.S.C. 1101(a)(13)(C)(ii)), they remain subject to the admissibility requirements of section 212 of the INA (8 U.S.C. 1182) because of their status as an alien and not a United States citizen. Accordingly, DHS must determine whether an LPR is admissible to the United States whenever the LPR arrives at a port of entry, as well as determine whether an LPR is removable from the United States based on intervening facts since the time LPR status was granted, and initial background checks conducted, which may have been many years ago. US-VISIT enables DHS to determine if an LPR seeking entry has been convicted of any crime that would render him or her subject to removal from the United States. In addition, DHS is concerned about attempts by terrorist and transnational criminal organizations to recruit LPRs, who are perceived to be subject to less scrutiny in travel. See section 101(a)(13)(C)(v) of the INA (8 U.S.C. 1101(a)(13)(C)(v)). Accordingly, the processing of LPRs through US-VISIT serves an important purpose: Identifying aliens who pose a security risk, have a disqualifying criminal or immigration violation, or are otherwise inadmissible at the time that they present themselves for entry into the United States as LPRs.

DHS compares the fingerprints collected as part of the adjustment of status or immigrant visa process with the fingerprints of the LPR seeking entry, when those fingerprints are available in DHS's Automated Biometric Identification System (IDENT). The addition of data from adjustment of status and immigrant visa applications to the IDENT system will substantially reduce the initial enrollment of LPRs, but LPRs, as aliens, should be enrolled in US-VISIT.

Finally, the statutes underlying the development of US-VISIT have never distinguished between immigrants and nonimmigrants. For the purpose of data collection and biometric comparison,

the law requires the collection of data from all aliens.

## 2. Relationship to United States Citizens

Five commenters suggested that LPRs should not be subject to US-VISIT because they are so similar to United States citizens, and United States citizens are not subject to US-VISIT by the terms of this rule. DHS does not agree that the difference between an LPR and a United States citizen is minor. The INA defines the term "alien" as "any person not a citizen or national of the United States." See section 101(a)(3) of the INA (8 U.S.C. 1101(a)(3)).

Similarly, some commenters suggested that the distinction between LPRs and United States citizens in terms of US-VISIT processing should be "all or nothing." In other words, these commenters stated that either both LPRs and United States citizens should be subject to US-VISIT, or neither should. Generally, these comments tend to suggest that passports are just as likely to be used fraudulently as permanent resident cards and that there are no significant legal differences between LPRs and United States citizens. A corollary argument was made by other commenters: DHS should increase significantly the security features of the Form I-551 in order to make them equivalent to passports in terms of security.

As a legal matter, LPRs, although allowed to stay and work in the United States permanently, are still "aliens" and subject to immigration law. Unlike United States citizens,

- The status of LPRs can be rescinded under section 246 of the INA (8 U.S.C. 1256) and LPRs can be removed from the United States under section 237 of the INA (8 U.S.C. 1227);<sup>4</sup>

- LPRs are required to acquire and carry evidence of their status (Form I-551) and replace it when it is lost or expires under section 264 of the INA (8 U.S.C. 1304) and 8 CFR 264.5(b);

- LPRs must present specific documentation as a condition for admission and re-admission to the United States under section 211 of the INA (8 U.S.C. 1181) and 8 CFR 211.1(a);

- LPRs must notify DHS of each change of address and new address within ten days of the date of the change of address under section 265(a) of the INA (8 U.S.C. 1305(a)) and 8 CFR 265.1;

- LPRs may be deemed to have abandoned their status when outside of the United States for more than one year, unless they obtain a re-entry permit, in line with the documentary requirements at 8 CFR 211.1(a) and (b)(3); and

- LPRs must apply for naturalization to obtain citizenship, demonstrating good moral character and at least five years of continuous residence under section 316 of the INA (8 U.S.C. 1427), as well as an understanding of the English language and a knowledge and understanding of the fundamentals of the history and of the principles and form of government of the United States under section 312 of the INA (8 U.S.C. 1423).

These requirements, and others, clearly differentiate LPRs from United States citizens. Moreover, LPR status does not grant an alien a variety of benefits accorded to a citizen of the United States, including the most fundamental right to vote for federally elected officials. See 18 U.S.C. 611 (criminal penalties for alien voting). Aliens, whether immigrants or nonimmigrants, may not serve on a federal jury. See 28 U.S.C. 1861 (declaration of policy that citizens sit on juries), 1862 (discrimination against citizens on account of race, color, religion, sex, national origin, or economic status prohibited for jury service), 1865(b)(1) (requirement of citizenship for jury service); 18 U.S.C. 243 (discrimination on basis of race or color against citizens prohibited in jury selection). Accordingly, obtaining LPR status is not equivalent to citizenship and DHS is not constrained to treat aliens in LPR status and citizens alike.

Finally, DHS has a specific and unique responsibility with respect to ensuring that LPRs comply with the requirements of their status. DHS does not accept the argument that LPR status is so equivalent to United States citizenship that US-VISIT processing must be the same or similar for both. DHS recognizes that most LPRs do not pose a threat to the United States and do not commit crimes that would subject them to removal, and has accommodated the free flow of travel by LPRs by instructing them to seek inspection at airports by joining the "United States Citizen" inspection line. This accommodation does not mean that LPRs are, or will otherwise be treated as, United States citizens.

DHS is taking steps to improve the security of permanent resident cards, but that does not necessarily mean that they should remain exempt from contemporaneous biometric identification under US-VISIT. As

noted above, DHS has proposed to invalidate all permanent resident cards without an expiration date; this action will facilitate upgrading card security and evidence of LPR status legitimacy and security. 72 FR 46922 (Aug. 22, 2007). US-VISIT is only one step in the ongoing efforts by DHS to improve the security of the United States and enforce the immigration laws of the United States.

DHS believes that US-VISIT creates better protections against the fraudulent use of immigration documentation than does mere document examination, and does so in a way that is cost-effective. Using US-VISIT, a CBP officer can match an LPR's biometric features against a database where those features are stored based on the processing done to obtain the benefit of LPR status (either an immigrant visa or an adjustment of status application). This greatly diminishes the possibility that a Form I-551 can be used fraudulently to obtain entry to the United States because there is an automated comparison to the biometric characteristics and an examination of the card itself. Thus, the security features on the Form I-551 itself are extremely helpful, but it is the biometric checks that provide the best security against immigration fraud, as this also prevents legitimate cards from being used by those to whom a card was not issued. DHS believes that because it has the biometric data collected for LPRs and the capability to technically, quickly, and easily compare those data to a person seeking to enter a port of entry, DHS has a responsibility to use those data to ensure that the person seeking admission is using his or her documentation legitimately.

## 3. Relationship to Canadian Citizens

Twelve commenters suggested that it was unfair to exempt Canadian tourists from US-VISIT, but require LPRs to be enrolled and processed by US-VISIT. Another commenter opposed LPR enrollment in US-VISIT, but supported the enrollment of all Canadian citizens regardless of the purpose of their trip to the United States.

DHS understands that the "staged" implementation of US-VISIT can carry the perception of unfairness. However, the distinction between LPRs and Canadian temporary visitors is not based on the notion that one is inherently more of a "threat" than the other. Logistical difficulties in implementation of biometric checks at primary inspection in the land border environment and foreign policy issues govern the continued exemption of

<sup>4</sup> Even after an LPR is naturalized as a United States citizen, such naturalization can be revoked under section 340 of the INA (8 U.S.C. 1451). [Suggest adding language to make clear there are very limited bases for revocation. Otherwise, this may be misleading.]

Canadians visitors for business or pleasure for the time being.

All LPRs and Canadians arriving at land border ports of entry are treated the same—those who are sent to secondary inspection are processed through US-VISIT; those who are inspected at primary inspection are not. Aliens requiring a Form I-94 (select Canadians, in this case) will actually be referred to secondary inspection more often than LPRs, because they must secure a new Form I-94, in most cases, every six to eight months in addition to those instances where such referrals may be made for any other reason. In some instances, such as classifications with extended duration of status, a single Form I-94 may be valid for an extended period, those aliens must renew their Form I-94 at least every six to eight months. This result is simply a function of the need for additional technological advancements in order to build an operational system that can function as a biometric entry system without significantly impairing the efficiency of inspections.

#### 4. Travel Concerns in United States Air and Sea Ports

Seven commenters mentioned the current structure of most United States airports and seaports, where “United States Citizens/LPRs” are directed into one inspection line and “Visitors” are directed to a different inspection line. They suggested that placing LPRs in the “Visitors” line merely for the sake of US-VISIT processing would cause significant delays for them and could separate families traveling together. DHS has deployed US-VISIT equipment in virtually all lanes at United States airports and seaports where US-VISIT is functional. This deployment allows CBP the flexibility to quickly change “Citizen/LPR” lanes to “Visitors” lanes and vice versa, as there is a need to balance and rebalance the time spent in the queue and process all arrivals efficiently and effectively. Because of almost universal lane availability, DHS will be able to process LPRs and others in the existing lane determinations. LPRs will remain within the “United States Citizen/LPR” lanes and will not be shifted into the “Visitors” lane unless such action could expedite processing. Additionally, LPRs are processed in the same lanes as United States citizen lanes, in many instances, to process entire families more expeditiously; DHS continues to recognize and attempt to accommodate families traveling together.

One commenter stated that this would cause delays for United States citizens, as the lanes dedicated to LPRs and

United States citizens will slow down. DHS will monitor delays in processing carefully, but does not believe that US-VISIT will add to such delays. The United States averages roughly 33 million air/sea port arriving United States citizen travelers per year and approximately 4.4 million air/sea port arriving LPR travelers per year. Further, many ports of entry use dedicated “United States Passport only” lanes even within the “United States Citizen/LPR” lanes. DHS believes that the application of US-VISIT to LPRs will not impact United States citizens’ travel to a significant degree.

One commenter questioned whether, given that DHS does not currently possess electronically searchable fingerprints on all LPRs, LPRs would be required to provide a full set of ten fingerprints (or “10 prints”) through US-VISIT at the point in which US-VISIT transfers to 10-print enrollment. DHS began transitioning to 10-print devices and capture at primary inspection in December 2007.

The process for LPR enrollment and verification will be the same as for other aliens. If entering the United States at a port with available 10-print devices, LPRs will be enrolled through the 10-print enrollment process. Thus, an alien will need to submit 10 fingerprints only one time (whether at a port of entry or at a USCIS Application Support Center), and all subsequent times, in whatever environment, the alien will provide less than 10 fingerprints for verification. DHS will possess a higher percentage of 10 prints in its biometric database for LPRs, because LPRs generally must renew their permanent resident card every 10 years and are required to submit 10 fingerprints as part of the renewal process.

#### 5. Travel Concerns at Land Border Inspections

One commenter implied that the treatment of LPRs is unfair due to lack of radio frequency identification (RFID) chips in the Form I-551. This comment refers to a DHS proof of concept program in which five land border ports of entry have used RFID technology to track exits and pre-position information on entry for nonimmigrants. *See* 70 FR 44934 (Aug. 4, 2005). This proof of concept has now been concluded. While Form I-551 does not provide, at this time, an RFID chip, treatment of nonimmigrants, immigrants, and citizens does not, and has never, required parity.

DHS agrees that documentation issued to different aliens should be consistent to the extent practical and to the extent that consistency serves security and efficiency goals. DHS is

examining integration of data processes to provide both better security and better efficiency. Accordingly, DHS will consider additional opportunities to include LPRs in these initiatives in addition to United States citizens and Canadian travelers.

LPRs at the land border, however, are less likely than nonimmigrant aliens to be referred to secondary inspection as discussed above. LPRs will be referred to secondary inspection only when a CBP officer in primary inspection determines that further investigation is required before admission, as is the current practice. There is no reason to believe that LPRs, as a result of the promulgation of this rule, will be referred to secondary inspection more frequently or will spend significantly more time while in secondary inspection. Nonimmigrant aliens, on the other hand, are referred to secondary inspection routinely at least every six to eight months to renew their Form I-94.

#### 6. Privacy Concerns of LPRs

Five commenters suggested that promulgation of the rule as proposed would violate, in a very generic way, the privacy rights of LPRs. One commenter objected to the retention of travel information on LPRs.

DHS complies with the Privacy Act, 5 U.S.C. 552a. In addition, the Homeland Security Act of 2002, in creating DHS, established a Privacy Officer who is tasked with assuring full compliance with the Privacy Act, advising the Secretary and DHS on the privacy of personal information, and conducting privacy impact assessments on DHS regulations. *See* Homeland Security Act of 2002, Public Law 107-296, tit. II, § 222, 116 Stat. 2135, 2155 (Nov. 25, 2002) (as amended, found at 6 U.S.C. 142). DHS has published the privacy impact analysis for this rule. *See* 71 FR 42653. DHS continues to be concerned about the privacy of all persons in the United States and compliance with the laws affecting privacy.

However, the US-VISIT programmatic statutes all refer to “aliens” without differentiation. DHS believes the intent of these statutes is clear: LPRs are to be included within US-VISIT as much as practical and consistent with other legal obligations relating to travel documents issued by the United States, including those issued by DHS and DOS. Most LPRs travel internationally on DHS-issued documents; therefore, LPRs are directly impacted by these requirements. Additionally, DHS has a legitimate need for maintaining some information on LPR travel. DHS has collected travel information on LPRs for many years, originally as part of the

Treasury Enforcement Communications System (TECS) that was transferred to DHS in 2003. See 66 FR 52984, at 53029 (Notice of Privacy Act systems of record). Per DHS regulations, an LPR can be deemed to have abandoned his or her status if he or she stays outside of the United States for longer than one year. See 8 CFR 211.1(a), (b)(3) (imposing certain documentary requirements or waiver applications on LPRs only if returning from a temporary absence of less than a year).

#### 7. Ten-Print Enrollment

One commenter inquired whether LPRs for whom DHS has no electronic biometric record will have ten-print or two-print fingerscan enrollment upon being processed in US-VISIT in the primary lane. DHS began transitioning to a ten-print enrollment process in December 2007. These processes will not be limited to LPRs, however, and DHS is confident that it can use technology to minimize the potential for delay as a result of the change.

#### B. Canadian Citizens

##### 1. Western Hemisphere Travel Initiative

The Western Hemisphere Travel Initiative (WHTI) requires that the Secretary of Homeland Security, in consultation with the Secretary of State, develop and implement a plan to require travelers entering the United States to present a passport, other document, or combination of documents which is "deemed by the Secretary of Homeland Security to be sufficient to denote identity and citizenship" by June 1, 2009. See section 7209 of IRTPA, Public Law 108-458, 118 Stat. at 3823, as amended by the Department of Homeland Security Appropriations Act, 2007, Public Law 109-295, sec. 546, 120 Stat. 1355, 1386 (Oct. 4, 2006), found at 8 U.S.C. 1185 note. DHS and DOS have implemented this requirement effective January 23, 2007, for air ports of entry. 70 FR 52037 (Sept. 1, 2005) (Western Hemisphere Travel Initiative, ANPRM); 71 FR 46155 (Aug. 11, 2006) (same, NPRM); 71 FR 68412 (Nov. 24, 2006) (same; air ports of entry; Final Rule).

One commenter to this rule asked whether the Canadian border issues that have been addressed through WHTI were being taken into account in the promulgation of this rule. DHS has been working very closely with Canadian authorities in order to secure better the border between the United States and Canada without sacrificing the close ties between the two countries. In March 2005, the Administration launched the Security and Prosperity Partnership (SPP) as a trilateral effort with Canada

and Mexico premised on the mutual reinforcement of our security and economic prosperity. See [http://www.spp.gov/Security\\_Fact\\_Sheet.pdf](http://www.spp.gov/Security_Fact_Sheet.pdf). Through this effort and others, the United States and Canada are engaged in greater cooperation and information sharing, while being mindful of the privacy laws of each country. Together, the United States and Canada are exploring ways to facilitate legitimate travel and trade while assuring the security of our border. All of these efforts were considered in the promulgation of this rule.

Another commenter suggested that the NPRM fails to consider the impact of WHTI and this US-VISIT expansion at the same time. This rule is being implemented on January 18, 2009, and the first phase of WHTI (requiring a passport or other document to demonstrate identity and citizenship at air ports of entry) began on January 23, 2007. The second phase of WHTI (land borders and sea ports) was published as a final rule on April 3, 2008, and will be effective June 1, 2009. 73 FR 18384.

This expansion of US-VISIT procedures deals with the type of immigration processing certain aliens will require at all ports of entry, with the differences described elsewhere based on the type of port of entry. One of the main reasons for exempting Canadians who do not require a separate admissibility determination through Form I-94 in this rulemaking is to coordinate the timing of the WHTI land border port of entry procedures, before DHS can determine what, if any, additional steps should be taken for US-VISIT processing of these aliens at land border ports of entry. DHS and DOS are carefully coordinating the implementation of multiple initiatives to improve the security of the United States and ensure efficient border management.

##### 2. Preclearance Sites in Canada

Three commenters expressed concern that the preclearance sites in Canada would see a dramatic increase in the numbers of aliens subject to US-VISIT and be unable to handle the increase in time and traffic. One commenter also noted that unlike the traditional environment of immigration processing where the flights have already landed, in the preclearance environment, persons are trying to board a flight before it is too late, and that, therefore, the delays would be much more costly.

DHS acknowledges the concerns with preclearance flight locations in Canada. However, DHS notes that Canadians not requiring visas—which include those transiting the United States or applying

for admission to the United States as visitors for business or pleasure—are not required to be processed in US-VISIT. Accordingly, the increased volume of preclearance travelers in US-VISIT may not be as high as the commenters suggest. Nonetheless, DHS has existing mitigation strategies in effect to respond to overcrowded inspection facilities. DHS will pay close attention to these preclearance locations to determine whether implementing these strategies is appropriate, especially during the first few weeks after this final rule becomes effective.

##### 3. Canadians Requiring a Waiver of Inadmissibility

One commenter expressed concern about Canadian B-1/B-2 travelers who frequently travel over the land border and require a waiver of inadmissibility under section 212 of the INA (8 U.S.C. 1182) to be admitted to the United States. DHS is currently considering alternative administrative processes for simplified handling of waivers and their application to US-VISIT, but until DHS implements these processes, DHS will maintain the same procedures for Canadian B-1/B-2 travelers requiring a waiver of inadmissibility as it has with all Canadians requiring a waiver of inadmissibility and given a multiple entry Form I-94: US-VISIT secondary processing every six months or when sent to secondary by a CBP officer. Canadian B-1/B-2 applicants for admission requiring a waiver of admissibility will not be required to be processed in US-VISIT every time they cross a United States land border.

##### 4. Canadians in Transit Through the United States

Three commenters raised concerns about Canadians in transit through the United States, two in the land context and one in the air context. In the air context, one commenter suggested that Canadian B-1/B-2 travelers will be exempt from US-VISIT processing if flying to the United States, but not if they are flying through the United States. DHS agrees with the commenter that this would be an illogical result if this were in fact what had been proposed. The proposed rule provided that Canadians are subject to US-VISIT procedures only if they are required to obtain a visa or be issued a Form I-94. Typically, Canadians may transit through the United States by air without a visa and are not required to obtain a Form I-94. See 8 CFR 212.1(a)(1) (no visa required); 8 CFR 235.1(h)(1)(i) (no Form I-94 required). Canadians needing a waiver of inadmissibility are required to obtain a visa even if transiting the

United States. Thus, only these Canadians transiting the United States but needing such a waiver and visa are subject to US-VISIT as a result of publication of this final rule.

Accordingly, the number of Canadians transiting the United States by air who will be subject to US-VISIT is small.

In the land context, another commenter suggested essentially the same point, explaining a scenario in which a Canadian truck driver entering the United States as a visitor for business (and who is thus visa-exempt) would not be subject to US-VISIT processing, but where the same person transiting through the United States to Mexico would be subject to US-VISIT processing. The commenter conceded that this was not currently a concern due to restrictions in hauling cargo between the three countries, but that it could be a concern in the future. DHS does not believe this scenario requires US-VISIT processing for the same reason as in the air environment. The driver in the scenario posed above—a truck driver taking cargo from Canada to Mexico—would not require a visa to enter the United States, nor would he be issued a Form I-94, regardless of whether he is ultimately driving to Mexico. Thus, transiting aliens who do not otherwise require US-VISIT processing would not be subject to US-VISIT processing as a result of this final rule.

#### 5. Crew Members

Two commenters suggested that Canadian airline crew members be exempt from US-VISIT requirements. These commenters stated that crew members are subject to significant levels of scrutiny to begin with, including checks made by Transport Canada and placement on the Master Crew lists provided to CBP 48 hours prior to departure. They also stated that the same reasoning applied to the continuing exemption for Canadian B1/B2 travelers appears to apply here, as each group is staying for a limited period of time. Finally, they said that any security benefits from these checks are insignificant compared to the costs that Canadian airlines would incur as a result of the inclusion of crew members in US-VISIT.

In promulgating this final rule, DHS is attempting to treat all aliens as equally as operationally possible in US-VISIT processing. In other words, crew from all other foreign carriers (D visa holders) currently are required to be processed in US-VISIT, and in nearly all airports there is a special crew lane designated especially for air crew members' use. Based on observations from the four

years that US-VISIT has been operational, DHS does not believe that any delay for crew travel has been so significant as to justify continuing to not process airline crews through US-VISIT based on country of origin or nationality. Second, DHS does not believe that the connection to Canadian B1/B2 travelers is equivalent, as the exemption for those travelers is meant to account for the unique operational concerns of the land border environment. In addition, the extra checks that are mentioned by the commenter are biographic checks, and not the biometric checks that US-VISIT processing would provide.

However, the commenter also identifies an inequity faced by Canadian crew with respect to biometric exit procedures. Because of the large number of United States preclearance sites in Canada, Canadian airlines often fly into United States domestic airport terminals. The commenter states that if one of these airlines were to fly into a United States airport where biometric exit processing were operational, the Canadian crewmember would be required to leave the domestic terminal, go to the international terminal, record his exit biometrically, and then return to the domestic terminal for the next flight.

DHS agrees with the commenter that under these specific circumstances it may be unreasonable for Canadian airline crew members to biometrically register their departure. The exit pilot program has been terminated and, therefore, no pilots are being required to provide to register their departure.

#### C. Mexican Citizens

Two commenters stated there should be no continued exemption for Mexican citizens, as the BCC and Form I-551 are the same. Currently, Mexican citizens who use a BCC to meet the documentary requirements of 8 CFR 212.1, if staying in the United States for 72 hours or less within a specified distance from the United States/Mexico border, are not required to obtain Form I-94 and, therefore, are not subject to US-VISIT. See 8 CFR 235.1(h)(1)(iii), (v). The commenter is correct that, from a security standpoint, BCCs are equivalent to Forms I-551 carried by LPRs. DHS anticipates that procedures for interacting with these two populations will be very similar. At air or sea ports of entry, both populations will be biometrically checked on every encounter. At land borders, under this final rule, LPRs and BCC holders will be checked as appropriate by CBP officers. This final rule adds LPRs to the list of travelers who, upon being referred to secondary inspection at land border

ports of entry, will be processed in US-VISIT. Thus, this rule places LPRs and BCC holders in equivalent circumstances.

#### D. Operational Issues

##### 1. Clarification of Procedures for Returning Nonimmigrants

One commenter professed confusion with the proposed regulation's treatment of nonimmigrants returning through a land border port of entry, suggesting that DHS should clearly state whether it plans to conduct US-VISIT processing of all returning nonimmigrants arriving at a land port who, during primary inspection, present a valid visa and a current, multiple-entry Form I-94.

Nonimmigrant visa holders have been subject to US-VISIT processing in secondary inspection at the 50 most trafficked land border ports of entry since December 2004, and at all land border ports of entry since December 2005. These procedures have been in place for three years, and the additional alien classifications added by this final rule do not change any existing land border procedures. Nonimmigrant aliens requiring completion of a Form I-94 may be referred to secondary inspection at any time at the discretion of the CBP officer at primary inspection, but at least every six to eight months for renewal of the Form I-94, regardless of the time remaining on the validity of the document or whether it is issued for duration of status (D/S). Forms I-94 issued following US-VISIT processing are marked with the date on which the alien's period of admission expires (or duration of status, if applicable) and the date on which the person was processed in US-VISIT. At primary inspection, the alien is referred to secondary inspection for US-VISIT processing if six to eight months have passed since the last time the alien was processed in US-VISIT (depending on the level of activity at the port of entry at that moment, the capacity to efficiently process the alien, and other factors). If no adverse information is found relating to that alien, the alien is admitted under the existing terms of the original Form I-94.

The commenter characterizes this procedure as "recurrent readjudication of previously approved nonimmigrant status." DHS does not agree with this characterization. Under the INA, each nonimmigrant alien applies for admission to the United States by approaching a port of entry and presenting identification for inspection, and DHS determines whether that nonimmigrant alien is admissible to the United States. See sections 101(a)(13),



212(a), 214, and 235(a)(3) of the INA (8 U.S.C. 1101(a)(13), 1182(a), 1184, and 1225(a)(3)). DHS is not persuaded that requiring some nonimmigrant aliens to undergo an abbreviated review every six to eight months at the land border ports of entry is somehow illegitimate or unfair to the nonimmigrant alien who is being inspected and admitted, or denied admission. The DHS policy of requiring the alien to be processed every six to eight months responds to the precise problem raised by the commenter—a CBP officer has a two-month “gap” in which to refer multiple entry aliens to secondary inspection for US–VISIT processing in order to best select a time that would be the least burdensome on the alien. DHS feels strongly that the balancing test here—the need for additional security and an additional tool to combat immigration fraud against what is, at worst, a minor inconvenience to the alien—favors the proposed policy.

The commenter suggested also that the proposed regulation would inject uncertainty and inefficiency into the process, as a Canadian would need to carry the entire documentation for their visa classification, as well as payroll records and employment records to prove whatever the examining officer might decide is required to establish maintenance of status. DHS policy does not currently require such complex presentations on existing Forms I–94, nor does DHS anticipate changing this policy as a result of this final rule. Experience has established that the program is not being executed in the way the commenter fears. Under the INA, an alien may be required to present all of the appropriate evidence necessary to establish admissibility at any inspection or at any time. See e.g. section 264(e) of the INA, 8 U.S.C. 1304(e).

## 2. Real ID Act of 2005

One commenter suggested that the expansion of alien categories in US–VISIT, in conjunction with the REAL ID Act of 2005, would have an impact on the states’ relationship with the federal government under Executive Order 13132 because the REAL ID Act will require states to issue driver’s licenses with effective dates that do not exceed the time permitted on the alien’s admission period on the Form I–94. DHS disagrees.

The REAL ID Act of 2005 prohibits federal agencies from accepting a state driver’s license or personal identification card for any “official purpose” unless it has been issued by a state that has certified to, and been determined by DHS to meet, the

minimum document requirements, minimum issuance standards, and other requirements of the REAL ID Act. See REAL ID Act of 2005, Public Law 109–13, Div. B, tit. II, section 202, 119 Stat. 231, 302, 312 (May 11, 2005) (49 U.S.C. 30301 note). Nothing in the REAL ID Act or final rule pertains to the expansion of the population of persons subject to US–VISIT requirements under this final rule. The commenter’s concern that under the REAL ID Act and implementing regulations, states will issue REAL–ID compliance licenses to aliens that track with period of the aliens lawful status in the United States is outside the scope of this rulemaking action. The present regulatory action to expand US–VISIT makes no regulatory change that has a direct impact on the states. See 72 FR 10819.

## 3. Advance Passenger Information System

One commenter suggested that the proposed expansion of US–VISIT was inconsistent with previous DHS regulatory statements regarding the possible elimination of the Form I–94. DHS understands this concern and believes that it is pursuing a consistent long-term goal that may result in elimination of the Form I–94.

DHS currently requires the electronic transmission of manifest information for passengers (passenger name record or “PNR”) and crew members to CBP in advance of those flights. *Electronic Transmission of Passenger and Crew Manifests for Vessels and Aircraft*, 70 FR 17820 (Apr. 7, 2005) (Advance Passenger Information System or “APIS” final rule); *Advance Electronic Transmission of Passenger and Crew Member Manifests for Commercial Aircraft and Vessels*, 72 FR 48320 (Aug. 23, 2007) (“APIS Quick Query or “AQQ” final rule”). As noted in the APIS final rule, DHS continues to study whether, and the extent to which, the transmission of APIS data can replace the submission of paper forms. At that time, DHS indicated that preliminary analysis suggested that Forms I–94 and I–418 could be significantly reduced, if not eliminated. That evaluation is ongoing as DHS pursues a consolidated data analysis approach—beginning with applications for visas to the DOS and machine-readable passports, through advance passenger information, to inspection admission verification, and to exit verification. As technological capacity further develops, DHS believes that a unified system is possible and preferable. This expansion of US–VISIT is one step toward that unified and streamlined goal. As further steps become possible and are taken,

appropriate regulatory changes will be adopted and obsolete forms eliminated.

## 4. Connection to IDENT/IAFIS Interoperability

One commenter questioned the interconnections between US–VISIT under the changes in the regulations as proposed and IDENT, and the Federal Bureau of Investigation’s (FBI’s) Integrated Automated Fingerprint Identification System (IAFIS). The commenter expressed concern that IDENT database entries might be made available in the IAFIS database and opposed any plan to place civil immigration violations in a criminal database. Finally, the commenter requested an update on the ability of the systems to timely reflect changes and extensions of status. The commenter suggested that the proposal to expand US–VISIT to additional alien populations should wait for full IDENT/IAFIS integration.

IDENT is a DHS-wide electronic record system for the collection and processing of biometric and limited biographic information in connection with the national security, law enforcement, immigration, intelligence, and other mission-related functions of DHS, as well as for any associated testing, training, management reporting, planning and analysis, or other administrative uses. See 71 FR 42651 (July 27, 2006) (systems of records notice for IDENT).

IAFIS is a national fingerprint and criminal history system maintained by the Criminal Justice Information Services (CJIS) Division of the FBI. IAFIS provides automated fingerprint search capabilities, latent searching capability, electronic image storage, and electronic exchange of fingerprints and responses. As a result of submitting fingerprints electronically, agencies receive electronic responses to criminal ten-print fingerprint submissions within two hours and within 24 hours for civil fingerprint submissions.

DHS, DOJ, and DOS are collaborating to achieve interoperability between IAFIS and IDENT. See 71 FR 67884, 67885 (Nov. 24, 2006) (Interim Data Sharing Model). Interoperability is defined as the sharing of alien immigration history, criminal history, and terrorist information based on positive identification and the interoperable capabilities of IDENT and IAFIS. Interoperability between the two systems is expected by late 2009. DHS and FBI already share information for the most egregious offense data sets held by the FBI, including known or suspected terrorists, wanted persons,



and sex offenders, as well as serious immigration violators.

It is unclear from the comments why the proposal to expand the classifications of aliens subject to US-VISIT should wait for full IDENT/IAFIS interoperability. DHS currently receives substantial benefits from screening without interoperability because US-VISIT identifies existing aliens requiring further review (e.g. criminal warrants, prior deportations, etc.).

Whether immigration violations are made available to law enforcement officers through IAFIS is not germane to this final rule. As IDENT/IAFIS interoperability moves forward, any such determination will be discussed in the appropriate PIAs by the appropriate Department if and when contemplated.

Finally, although not germane to the rulemaking, DHS notes that biographic data from USCIS are transmitted to the Arrival Departure Information System (ADIS) so that changes to immigration status are reflected in US-VISIT in near-real time. Accordingly, US-VISIT has the capability to ensure that aliens who are in lawful status are not determined to have stayed past their original periods of admission if that period has been extended by USCIS.

#### 5. Biometric Identifiers

One commenter inquired about the language in the proposed rule that reserves the ability for DHS to collect "other biometric identifiers" in addition to photograph and fingerprints. This language is prophylactic. At this time, DHS has no plans to collect biometric identifiers in addition to photographs and fingerprints. However, DHS also recognizes that historically, other biometric identifiers such as height, weight, color of hair, color of eyes, etc., have been recorded, and this language continues to reflect that historic fact. Moreover, technological development may provide the capacity for use of other biometric identifiers in the future. DHS will make, as appropriate, changes in Privacy Impact Assessments and Systems of Records Notices for these systems.

Another commenter suggested that visual comparison of photographs is sufficient for identification. DHS disagrees. Document fraud, in some instances, has been effective in creating a false identity that defeats simple visual inspection of photographs with the face of the bearer. In addition, the commenter's suggestion overlooks the purpose of positive freezing of an identity with fingerscans to determine whether the individual is admissible to the United States or has committed

criminal or terrorist acts that bar admission.

#### 6. Age Restrictions

One commenter stated that the age limitations on the requirement to be processed in US-VISIT were too narrow, saying the program should be applicable to no one over the age of 60 years old, as opposed to over the age of 79. Another commenter suggested the opposite, saying that the age range should be expanded to cover those between the ages of 10 and 85.

US-VISIT processing is currently required of aliens who are between the ages of 14 and 79 and otherwise required to enroll and be verified in US-VISIT. Technically, it is possible to include more individuals who are younger and older than these age limitations. However, this age range is consistent with longstanding DHS and legacy INS policy concerning the fingerprinting of those seeking immigration benefits, including adjustment of status to permanent resident and naturalization. DHS uses exemptions consistent with these limitations. DHS may reconsider these age ranges in the future, but does not do so as part of this regulation. The current exemptions will continue to apply equally to all of the aliens enrolled in US-VISIT.

#### 7. Exemption of Individual Aliens

One commenter objected to language in the proposed 8 CFR 215.8(a)(2)(iv) and 8 CFR 235.1(f)(1)(iv)(D) that allows the Secretary of Homeland Security, the Secretary of State, or the Director of Central Intelligence to exempt any individual alien from the biometric entry or exit processes. Each of these three departments has specific reasons why a particular person should be exempt from the biometric collection process that is integral to their core mission. The individualized decision to exempt an alien is based on the interests of the United States in managing its foreign and military affairs and poses no risk to the security of the United States.

#### *E. Privacy and Information Retention*

Several commenters raised concerns relating to privacy, particularly the privacy of particular groups of aliens and DHS compliance with the Privacy Act, 5 U.S.C. 552a.

One commenter stated that DHS has not met its responsibilities under the Privacy Act by failing to publish a Privacy Impact Assessment (PIA). DHS has published a PIA. 71 FR 42653 (July 27, 2006). Though not legally required to do so because nonimmigrants are not covered by the Privacy Act, DHS, as a

matter of policy, has considered all aliens subject to US-VISIT as warranting Privacy Act analysis. DHS has published numerous PIAs and System of Record Notices (SORNs) for the systems making up US-VISIT. The PIAs published by US-VISIT list the principal users for, and uses of, the data contained within US-VISIT/DHS systems. The PIAs also identify the extent that the information may be shared with other law enforcement agencies of the United States, State, local, foreign or tribal governments, who, in accordance with their responsibilities, are lawfully engaged in collecting law enforcement intelligence information and/or investigating, prosecuting, enforcing or implementing civil and/or criminal laws, related rules, regulations, or orders. DHS has published the PIAs ([www.dhs.gov/privacy](http://www.dhs.gov/privacy)) and provided links to the system of records notices for the US-VISIT program. *See, e.g.*, 68 FR 69412 (Dec. 12, 2003); 68 FR 69414 (Dec. 12, 2003); 69 FR 482 (Jan. 5, 2004); 69 FR 57036 (Sept. 23, 2004); 70 FR 35110 (Jun. 16, 2005); 70 FR 38699 (July 5, 2005); 70 FR 39300 (July 7, 2005); 71 FR 3873 (Jan. 24, 2006); 71 FR 13987 (Mar. 20, 2006); 71 FR 42653 (July 27, 2006); 71 FR 42651 (July 27, 2006).

One commenter objected to the data retention policies of the US-VISIT system, stating that DHS does not have adequate justification for taking new photographs and fingerprints of aliens at each encounter. Another commenter questioned whether DHS should retain identification information perpetually, even if the alien later became a United States citizen. DHS is currently reviewing the retention policy for the Arrival Departure Information System (ADIS) and plans to adjust that policy to be consistent with the retention policy for IDENT, which is part of US-VISIT. IDENT is an encounter-based system compiling a complete travel history to permit DHS to prevent fraud and provide evidence of each particular encounter. DHS disagrees with the commenters' conclusion that insufficient justification exists for this system.

In addition, DHS uses the historical fingerscans to ensure that the best quality prints are matched against watchlists. This "best print forward" process involves evaluating the quality of the prints each time DHS encounters an alien and using the best quality print from that point on. DHS is less and less likely to receive a "false positive," as the quality of prints will improve over a lifetime of encounters—both because of this quality selection process and because of improvements in the

hardware and software used in the process.

Another commenter questioned how many adverse actions were based on “false positives.” None of the adverse actions were based on false positives. DHS is aware of the potential of false positive “hits” against immigration and criminal databases and has taken documented steps to address this potential. Currently, US-VISIT uses a series of matching algorithms and thresholds developed in consultation and testing with the United States National Institute of Standards and Technology (NIST). An automated fingerprint comparison establishes mathematical scores of matching and non-matching, and a non-conclusive score is checked manually by a fingerprint examiner located at the DHS Biometric Support Center. The Biometric Support Center manually determines whether any “close” match is a “false positive” on a 24-hour, seven-day-per-week basis.

Three commenters stated that what they perceived to be low numbers of “adverse actions” against those being matched against biometric databases provided evidence that the program should be scaled back instead of expanded. DHS does not agree and does not measure the success of the program solely by the specific number of adverse actions. Further, the number of adverse actions pertains to those in which the person was identified solely by biometric information. It also excludes those who were identified but ultimately admitted. Finally, it obviously does not include those who were deterred by the system in the first place. Overall, measuring a program’s success by the detection of the things it is designed to prevent does not necessarily lead to significant conclusions.

#### F. International Conventions

One commenter argued that the proposed rule would violate the obligations of the United States under Articles 10, 12, and 21 of the International Covenant on Civil and Political Rights (ICCPR) of 1966 relating to detention, freedom to leave a country, and assembly. The commenter suggests that these provisions apply in the border management process when a person requests admission at a port of entry. [I sent question to Nina and Elizabeth]DHS disagrees. The ICCPR is not self-executing and was ratified with limitations and understandings. See *International Covenant on Civil and Political Rights*, Dec. 16, 1966, 999 U.N.T.S. 171, 6 I.L.M. 368, as signed and submitted see *Four Treaties*

*Pertaining to Human Rights*, Feb. 23, 1978, S. Exec. Docs. C, D, E, and F, 95th Cong., 2d Sess. (1978); as reported S. Exec. Rep. No. 23, 102d Cong., 2d Sess. 2 (1992); as considered and ratified in the Senate 138 Cong. Rec. 8070—8071 (1992); see *Multilateral Treaties Deposited with the Secretary-General: Status as of 31 Dec. 1995*, at 122, 130, U.N. Doc. ST/LEG/SER.E/14 (1996); *Sosa v. Alvarez-Machain*, 542 U.S. 692, 734–35 (2004) (stating that the ICCPR is not self-executing). The United States takes its international obligations seriously, and this rule violates no provision of the ICCPR.

Article 10 of the ICCPR is not applicable to the border management process by definition—Article 10 applies to the detention of persons for violation of the criminal laws of a signatory country. Although the ICCPR does not apply to this rule, DHS also does not believe there is anything inherently degrading or inhuman about the current US-VISIT process. Moreover, individuals often provide pictures for the purpose of obtaining a benefit—most notably in the context of obtaining a driver’s license, a passport, or some other form of identification and associated benefit. Photographs and fingerscans are common commercial identifying events.

Article 12 permits freedom to depart a country and limits any restrictions to those that are provided by law; are necessary to protect national security, public order, public health or morals, or the rights and freedoms of others; and are consistent with the other rights recognized by the present ICCPR. US-VISIT does not unduly restrict departure from the United States—it merely records departure. Many signatory countries to the ICCPR use some exit registration, and exit registration is generally considered to be consistent with the ICCPR.

Article 21 provides for the right of peaceful assembly, except that restrictions may be placed on the exercise of this right which are necessary in a democratic society in the interests of national security, public safety, public order, the protection of public health or morals, or the protection of the rights and freedoms of others. However, nearly all governments can, and do, inspect people traveling across their international borders, and they do so in every country every day. Accordingly, DHS does not believe this rule violates or impacts any of the obligations of the United States under the ICCPR.

#### G. United States Citizen Voluntary Enrollment

Three commenters stated that US-VISIT should be applied to all travelers, regardless of citizenship, for security reasons. Three commenters stated explicitly that they were opposed to this in the context that application of US-VISIT to LPRs would mean the eventual application to United States citizens. One commenter stated that there should be provisions through which United States citizens could voluntarily be biometrically identified through US-VISIT as a means of getting through security faster at airports. On the first point, DHS is limited by statute and regulation to apply US-VISIT to aliens. On the second point, DHS is exploring several types of “registered traveler” programs which may accomplish the same goal. Overall, this objective could be accomplished in the future, and DHS is exploring it, just not through US-VISIT.

#### H. Economic Impact

One commenter stated that DHS incorrectly certified that it was not required to conduct a Regulatory Flexibility Analysis, as required by 5 U.S.C. 603. In the NPRM, DHS did certify that such an analysis was not required, pursuant to the provisions of 5 U.S.C. 605(b), which provides that the requirement for an analysis does not apply if the head of the agency certifies that the rule will not have a substantial affect on small entities as that term is defined at 5 U.S.C. 601(6). See 71 FR at 42608.

The definitions for the Regulatory Flexibility Act provide that the term “small entity” is the composite of the terms “small business,” “small organization,” and “small governmental jurisdiction.” 5 U.S.C. 601(6). Normally a “small business” has the same meaning as the term “small business concern” under section 3 of the Small Business Act, 15 U.S.C. 632. A “small organization” generally means any not-for-profit enterprise which is independently owned and operated and is not dominant in its field. And, finally, a “small governmental jurisdiction” generally means governments of cities, counties, towns, townships, villages, school districts, or special districts with a population of less than fifty thousand. Although the statute permits deviation from these terms by following an established statutory procedure, DHS does not apply any different definition for this purpose. 5 U.S.C. 601 (3), (4), (5).

The Regulatory Flexibility Act applies to individuals only to the extent that

they are sole proprietors of businesses that are small entities; for example, an independent trucker. The Regulatory Flexibility Act does not apply to individuals, but to small businesses (for profit or not for profit), whether a sole proprietorship, a partnership, or a corporation, and small governmental entities, not the individuals who may own or belong to those organizations.

One commenter stated that DHS was incorrect to include in its Executive Order 12866 benefit/cost statements of the proposed rule that there are no potential costs or consequences associated with this rule that would impede the free flow of commerce and trade. The commenter suggests that Executive Order 12866 requires DHS to publish a thorough explanation as to how US-VISIT will benefit the efficient functioning of the economy and private markets and a full assessment of the costs of US-VISIT.

DHS believes that the commenter relies heavily on the notion that DHS plans to enact user fees to finance the US-VISIT program. As noted above, US-VISIT is funded by appropriations. DHS has no plans to charge a user fee to those seeking admission to the United States to finance US-VISIT.

DHS is required to weigh the benefits and costs of the changes of this particular rule. US-VISIT has, by design, been implemented in stages—for technology, operational, and cost reasons. This expansion of the classifications is another step for the program, and one in which DHS has weighed the benefits and costs. First, as stated previously, no additional individuals will be processed as part of US-VISIT at a land border without being sent to secondary inspection. The only aliens being added to land border secondary inspection under this rule are Canadian visa holders with a multiple entry Form I-94, and only once every six to eight months. In these instances, a Canadian being processed in secondary inspection may experience a fifteen second US-VISIT processing time, but this would be part of a several minute processing time in secondary inspection for reissuance of a Form I-94. Further, there is ample evidence, discussed in the proposed rule, that US-VISIT has actually reduced waiting times in the secondary environment at the land borders. DHS does not have any empirical evidence that the economies of land border communities will be adversely affected by expansion of US-VISIT. Moreover the commenters have not cited any empirical evidence supporting such an adverse effect.

Additionally, commenters raised questions relating to staffing, space,

security, and technology costs. As discussed above, in the proposed rule, and in previous rulemakings and notices, DHS has already deployed US-VISIT technological capability into virtually all primary lanes at air and sea ports of entry and in all secondary inspection environments in land border ports of entry. Therefore, the deployment costs, space, and technology issues are virtually nonexistent. Similarly, all CBP officers in air and sea primary inspection, and in secondary land inspection, are trained on the existing US-VISIT equipment and are already familiar with its use. Finally, DHS believes that expanding a biometric entry-exit system is more likely to increase security for the United States. Security, as the foundation for the US-VISIT program, is a point made numerous times by the 9/11 Commission Report and Congress.

#### *I. Attorney Representation*

One commenter suggests that attorneys should be permitted to represent applicants for admission to the United States in the inspection area. As an initial matter, this suggestion is not germane to the issues presented by the proposed rule. Any affirmative response to the comment would require substantial changes in regulations and procedures not addressed by the proposed rule to expand the implementation of US-VISIT. DHS, however, wishes to be responsive to the comment.

DHS has considered this proposal in the past and will not implement this proposal because it is neither required by law nor good policy. Congress has specifically provided for the expedited removal of aliens seeking admission who are inadmissible to the United States because of misrepresentation or on deficient or non-existent documentation. Section 235(b) of the Act, 8 U.S.C. 1225(b)(3). An applicant for admission to the United States may be permitted to withdraw his or her application for admission to the United States and depart immediately from the United States. Section 235(a)(4) of the Act, 8 U.S.C. 1225(a)(4). Removal proceedings for other aliens seeking admission to the United States are conducted before an immigration judge and the alien has the privilege of counsel during those proceedings. Sections 292, 240(b)(4)(A) of the Act, 8 U.S.C. 1362, 1229a(b)(4)(A).

The introduction of the concept of legal counsel into a secured international inspection area would severely disrupt the efficient processing of the vast majority of international travelers for little, if any, benefit.

Inspection of aliens and accompanying luggage is conducted very rapidly in a secured inspection environment for a number of different purposes. Facilities for detailed questioning in secondary inspection are limited. No evidence has been presented to DHS that suggests that any benefit accrues from permitting counsel to consult with clients in this environment when they are free to consult prior to seeking admission to the United States or if they are placed in removal proceedings.

Accordingly, DHS' regulations provide that:

[n]othing in this paragraph shall be construed to provide any applicant for admission in either primary or secondary inspection the right to representation, unless the applicant for admission has become the focus of a criminal investigation and has been taken into custody.

8 CFR 292.5(b).

Additionally, DHS does not believe that the expansion of US-VISIT requires a change to the existing regulation because US-VISIT does not significantly alter the inspection or admission process for aliens. Accordingly, DHS declines to expand the privilege of counsel into the secure inspection environment.

#### *J. Pacific Rim Issues*

A commenter expressed concern that the inclusion of those applying for admission under the Guam Visa Waiver Program could impair overall processing times at the Guam port of entry, noting that this specific inclusion affected a large number of individuals applying for admission in a port of entry that has limited capacity. The commenter suggested that DHS should be sure to adequately staff that port of entry and have a robust outreach strategy for those entering Guam.

The Guam Visa Waiver Program was established by section 14 of the Omnibus Territories Act, Public Law 99-396, sec. 14(a), 100 Stat. 837, 842 (Aug. 27, 1986) (adding section 212(l) to the INA, 8 U.S.C. 1182(l)), and is reflected in the regulations at 8 CFR 212.1(e). Citizens of many Pacific nations are exempt from the requirement of a visa if they are entering Guam as a visitor for business or pleasure, are staying for 15 days or less, and waive the right to contest any removal decision. To date, those entering under the Guam Visa Waiver Program have not been required to be processed in US-VISIT.

DHS shares the commenter's concern and understands that inclusion of those seeking admission to Guam under the Guam Visa Waiver Program will impact

that particular port disproportionately. DHS will make significant efforts to ensure that the outreach plan to nations in the Pacific is equivalent to the outreach when US-VISIT began and that the Guam port of entry has the resources it needs to process aliens in a timely manner. In addition, DHS has existing mitigation strategies in place for instances of excessively long wait times at immigration inspection and will monitor carefully the Guam port of entry to determine whether to invoke those procedures.

Another commenter suggested that aliens from the Federated States of Micronesia need to be added to the US-VISIT program. DHS agrees; Micronesia nationals would be covered under the definition in 8 CFR 235.1 in the proposed rule and in this final rule.

### III. Comments on the August 31, 2004 Interim Rule

#### A. General

DHS received a number of general comments on the US-VISIT program as a whole. These comments were mixed, and many expressed strong feelings about the program. Some commenters raised general immigration issues, such as whether the United States admitted the appropriate number of immigrants, whether treatment of Mexicans and Canadians was inequitable, and whether the program amounted to a stigma against the presumption of innocence. These comments are beyond the scope of the regulation and raise questions of whether Congress should alter the immigration laws of the United States.

These comments, however, indicate a misunderstanding of some of the basic laws that underlie the regulations. Every person arriving at the border of the United States must be inspected and every alien's admissibility to the United States must be determined. Under the immigration laws of the United States, the person seeking admission to the United States must establish that they are a United States citizen or a foreign national eligible for admission. See sections 212, 235 of the Immigration and Nationality Act (INA) (8 U.S.C. 1182, 1225). Inspection and admissibility upon arrival to the United States involves verification of the identity of the alien and a determination that the alien is admissible to the United States, i.e., that the alien has established that the alien has permission to be admitted and is not ineligible for admission by reason of any of the disqualifying provisions in the Immigration and Nationality Act, as enacted and amended by Congress.

The scope of the US-VISIT program, under the authorizing statutes discussed above, is, however, properly within the scope of the rulemaking. The 9/11 Commission pointed out that "targeting travel is at least as powerful a weapon against terrorists as targeting their money" and recommended a biometric entry-exit screening system as a result. T. Kean, et al., *Final Report of the National Commission on Terrorist Attacks Upon the United States* (9/11 Commission Report) (Government Printing Office, 2004) at 389. In successive enactments before and after the 9/11 Commission Report, Congress has insisted that DHS establish a comprehensive entry-exit data entry system. Accordingly, DHS has established the US-VISIT program and will, as practicable and subject to certain limited exceptions, expand the program to record the entry of all aliens. DHS recognizes that many individuals perceive distinctions within the universe of non-U.S. citizens as unfair, but most of these distinctions are made by Congress as a matter of law and cannot be changed by DHS. Distinctions within the universe of non-United States citizens made by DHS in the US-VISIT program reflect assessments of risk and threat, practicality of implementation based on international relations, capacity to implement universal alien data capture, and technological and other limitations.

#### B. Outreach to the Affected Public

Six commenters raised concerns about US-VISIT in terms of sharing information, most notably the concerns of the border communities. Three commenters raised the concerns of small businesses generally—that US-VISIT would result in fewer travelers and tourism and hurt the economy (and small businesses) as a whole. These commenters encouraged outreach to the affected communities and suggested that substantial notice be given to the public before changes to the program take place.

DHS disagrees with the notion that US-VISIT will result in fewer travelers and tourism. DHS is aware of no empirical evidence, and the comments have provided no empirical evidence, that the recordation of fingerscans in US-VISIT and verification of identities has an adverse impact on the number of travelers or tourists seeking admission to the United States, or that the development of US-VISIT will harm small businesses or the economy.

DHS, though US-VISIT, is committed to ensuring effective outreach to all persons affected by the program. Since 2004, US-VISIT has implemented an

ongoing strategy to facilitate dialogue with land border communities in the United States, Mexico, and Canada, engaging stakeholders in two-way discussions that allowed US-VISIT to learn and understand the specific issues and concerns related to border management in those communities. At the same time, this dialogue has created opportunities to educate stakeholders about the US-VISIT program, informing them of developments in program implementation, and gaining their assistance in reaching out to inform their own constituents about the program.

Since February 2004, DHS has hosted or participated in over 100 meetings with land border stakeholders in communities along the borders of, and in the interiors of, the United States, Mexico, and Canada. These meetings occurred in Texas, Arizona, New Mexico, California, Washington, Minnesota, Michigan, New York, Vermont, and Maine. In Canada, outreach was coordinated in Toronto, Vancouver, Montreal, Windsor, Sarnia, Ottawa, and Winnipeg. In Mexico, outreach activities were held in Mexico City, Reynosa, Tijuana, Ciudad Juarez, Monterrey, Nuevo Laredo, and Matamoros. DHS has placed numerous advertisements in publications serving border communities in the United States and Mexico to advise the public directly of the US-VISIT process.

DHS and US-VISIT have coordinated extensively with Canada on issues relating to the approximately 5,500-mile mutual border, through forums such as the Bi-National Technical Working Group, the Security and Prosperity Partnership (SPP), and participation in the Shared Border Accord meetings. The SPP is a trilateral effort to increase security and enhance prosperity among the United States, Canada, and Mexico through greater cooperation and information sharing. Through SPP, the United States and Canada have explored options for lower-cost, secure proof of status and nationality documents to facilitate cross-border travel, and have tested technology and made recommendations to enhance the use of biometrics in screening travelers.

DHS and US-VISIT have coordinated extensively with Mexico on issues relating to the 1,951-mile mutual border, including the Bi-National Technical Working Group. Mexico's National Institute of Immigration (INM) has helped to ensure that US-VISIT's education efforts are culturally appropriate so they can successfully reach, educate, and inform key population groups or communities in Mexico.

The effort to educate and engage the diverse border communities contributed significantly to US-VISIT's ability to implement the program at the 50 most trafficked land border ports of entry in 2004 and to deploy US-VISIT at the remaining 104 land border ports of entry where aliens are processed in 2005. The outreach efforts were critical to the smooth pilot testing and deployment of US-VISIT entry procedures at land border ports of entry.

DHS and US-VISIT recognize that outreach benefits not just the public, but the government as well. The success of the US-VISIT program is contingent on effective outreach. DHS and US-VISIT are committed to continue this outreach effort for future steps in the program.

### C. Use of Interim Rules

Three commenters suggested that the use of interim rules by DHS in the previous two US-VISIT rules was inappropriate.

DHS has used interim rules twice in the development of US-VISIT. In a January 5, 2004, interim rule, DHS implemented the first phase of US-VISIT and provided that aliens seeking admission into the United States through nonimmigrant visas must provide fingerprints, photographs, or other biometric identifiers upon arrival in, or departure from, the United States at air and sea ports of entry. The rule exempted several groups of aliens:

- Those with diplomatic recognition (A-1, A-2, C-3 (except for attendants, servants or personal employees of accredited officials), G-1, G-2, G-3, G-4, NATO-1, NATO-2, NATO-3, NATO-4, NATO-5, or NATO-6 visas, unless the Secretary of State and the Secretary of Homeland Security jointly determine that a class of such aliens should be subject to the rule);

- Children under the age of 14;
- Persons over the age of 79;
- Classes of aliens the Secretary of Homeland Security and the Secretary of State jointly determine shall be exempt;
- And an individual alien whom the Secretary of Homeland Security, the Secretary of State, or the Director of Central Intelligence determines shall be exempt.

69 FR 468 (Jan. 5, 2004). At the same time, DHS published a notice in the **Federal Register** setting forth the classes of aliens subject to US-VISIT and the air and sea ports where US-VISIT would be applicable. 69 FR 482 (Jan. 5, 2004). DHS received 21 comments on that interim rule and responded to those comments in the August 31, 2004, interim rule. 69 FR at 53323-53329.

On August 31, 2004, DHS implemented the second phase of US-

VISIT through an interim rule that expanded the US-VISIT program to land border ports of entry in the United States. That interim rule also further refined the population of aliens who are required to enroll in US-VISIT to include VWP travelers and ship crewmembers, and it exempted Mexican nationals who present a Border Crossing Card (Form DSP-150, or BCC), aliens who are not required to be issued a Form I-94 Arrival/Departure Record, and certain officials of the Taipei Economic and Cultural Representative Office. This interim rule is being finalized in this final rule. Subsequently, DHS has published notices applying US-VISIT to all land border ports of entry, implemented at secondary inspection.

DHS appreciates and understands the concern expressed by the commenters on the use of interim rules to implement the US-VISIT program. Consistent with the Administrative Procedure Act, DHS publishes proposed rules for public notice and comment whenever possible. 5 U.S.C. 553. Where DHS determines that expedited promulgation of a rule is required and has good cause to publish and make effective an interim final rule before receiving and considering public comments because delay would be impractical, unnecessary, or contrary to the public interest, DHS provides a clear statement to that effect. 5 U.S.C. 553(b)(B). DHS is committed to providing the public with an opportunity to comment on its rules and to considering public comments in making final decisions in promulgating rules.

One commenter questioned whether the August 31, 2004, interim rule contained sufficient information to permit the public comment on the second phase of US-VISIT. The scope and content of the comments received indicate that DHS provided ample information to support the interim rule, and DHS is responding to those comments in this final rule.

That interim rule included a sixty-day comment period. Additionally, the comment period was extended to 90 days (expiring on December 1, 2004) to provide an opportunity for commenters to observe and comment on the land border implementation (which began November 15, 2004). 69 FR 64477 (Nov. 5, 2004).

DHS is committed to ensuring that the public is able to comment on all aspects of the US-VISIT program. DHS is also committed to providing as much information as possible to permit public comment on the implementation of rulemaking.

### D. Facilities

Five commenters suggested that existing inspection facilities could not handle, without significant delays, any broad changes to the existing inspection procedures. One commenter suggested the need to create expedited lanes for frequent travelers, believing that the existing infrastructure was inadequate to make these types of changes.

To date, US-VISIT implementation at the land borders has not caused any significant delays and has actually decreased processing time at many ports due to the implementation of an automated Form I-94 issuance process at secondary inspection. As indicated in the proposed rule, US-VISIT has significantly decreased entry timing at certain monitored land border ports of entry. 71 FR at 42609.

While land border infrastructure is constrained, DHS has taken steps to alleviate congestion, such as implementing frequent traveler programs and dedicated lanes for their travel, where possible.

One commenter specifically suggested that including a broad number of Canadians in US-VISIT would have a detrimental effect on northern border facilities. This final rule and the July 27, 2006, proposed rule describe how DHS will include some Canadians in US-VISIT processing at land border inspection. DHS agrees that there are significant technological difficulties associated with implementing US-VISIT at land borders for all aliens' entry and exit through primary inspection. Whether expansion of US-VISIT will include installation at all primary inspection booths is, at this point, unclear. This rule establishes that only a small number, and not all, Canadians will be processed in US-VISIT at secondary inspection. DHS, thus, believes that the impact on northern border facilities will be minimal.

### E. Interaction With Existing Programs

Ten comments discussed US-VISIT interoperability with other existing programs that collect biometric or biographic information, most often those that impact the land borders, such as the Secure Electronic Network for Travelers Rapid Inspection (SENTRI), Free and Secure Trade (FAST), and NEXUS. Some commenters were concerned that multiple checks were repetitive and would not contribute to security, although they would slow down processing at the borders and airports. Other commenters noted that other programs have already vetted specific travelers and that further

security checks through US-VISIT are redundant.

DHS is committed to ensuring that international travel is both secure and efficient, and, therefore, is exploring ways to appropriately integrate US-VISIT, SENTRI, FAST, NEXUS, and other border screening and credentialing programs. DHS acknowledges the validity of the commenters' concern that multiple systems can create unnecessary redundancy. DHS is committed to ensuring that any unnecessary redundancy and inefficiencies are not perpetuated and that all border crossing programs are appropriately integrated over time.

#### F. Staffing and Training

Five commenters suggested that US-VISIT could have a negative impact if other areas of DHS did not support the program. For example, a few commenters stated that too few CBP officers were knowledgeable about issues surrounding US-VISIT and how it could affect admissibility.

Following the initial rollout of US-VISIT, DHS has taken additional steps to address this issue. For example, DHS sent training teams to all 50 land border ports of entry to instruct officers about the process changes as a result of US-VISIT implementation. In addition, DHS set up a telephone call center through the rollout of the 50 busiest ports of entry in November and December of 2004. In the Summer and Fall of 2005, other training steps were taken in conjunction with the rollout of the additional 104 land border ports of entry, including sending field trainers to each additional port implementing US-VISIT and providing on-line refresher courses on US-VISIT policies and procedures. US-VISIT procedures are implemented through the CBP management, training of officers, policy memoranda, and operational direction.

#### G. Travel and Delays

Six commenters expressed concern over the waiting periods in the inspection process that they claimed were caused by US-VISIT. These comments covered both past events in the air and sea context and concerns over future land border processes, and attributed delays to too few inspection booths and the inability of scanners to read fingerprints on the first try. Other commenters acknowledged shortened processing times due to the increase in the number of CBP officers available, but noted delays attributed to fingerprints not always being effectively scanned on the first try.

DHS is committed to ensuring that US-VISIT will be as least burdensome

as possible while accomplishing its mission and understands that facilitating legitimate travel and trade is one of the program's core goals. DHS attempts to ensure that there are adequate numbers of CBP officers to clear flights as expeditiously as possible. While DHS believes that it largely succeeds in this mission, it acknowledges that there are times when international passengers are not inspected as quickly as they or DHS would like. DHS is responsible for ensuring that all international travelers seeking admission to the United States are who they claim to be and are eligible for admission. The balancing of these responsibilities can occasionally cause delays.

DHS takes steps to increase CBP officer presence during peak hours. In addition, DHS has taken steps at various ports to attempt to improve the ability to read fingerprints quickly. For example, DHS has been experimenting with attaching a silicon film to the fingerscan reader to get more accurate readings, and this process has yielded good results thus far. DHS will continue to ensure that the US-VISIT process does not unduly delay the inspection process.

At the land border ports of entry, the current process for land border inspection remains largely the same as it was prior to the implementation of US-VISIT. Aliens who must acquire Form I-94 as evidence of admission are referred to secondary inspection rather than being processed in the primary inspection lanes. This process will continue following the publication of this final rule.

Another commenter raised the issue of implementing US-VISIT at the 50 most highly trafficked land borders in November and December of 2004, stating that this was the busiest time of the year due to the holidays, and suggested waiting until January 2005. DHS understands this concern, but DHS was required to implement US-VISIT at the 50 busiest land borders by December 31, 2004. DHS sought to avoid this issue when expanding US-VISIT to all other land border ports of entry in 2005. See 70 FR 54398 (Sept. 14, 2005) (additional ports being added prior to December 31, 2005). In future expansions of US-VISIT, DHS plans to avoid implementing changes during the peak travel times of the year. However DHS must reserve the decision on timing of future implementation until decisions are made based on all requirements at that time.

Two commenters raised concerns involving third-party nationals crossing at land borders, specifically the

southern border. One suggested that a strict interpretation of the existing regulations would require an alien who is not Mexican, but who has a multiple-entry Form I-94 and is a frequent border crosser (such as a person living on one side of the border and working on the other), to be processed in US-VISIT for every entry. DHS has not implemented such a policy. Those with multiple-entry Forms I-94 are required to undergo US-VISIT processing upon the expiration of their existing Form I-94, or every six to eight months.

#### H. Health Risks

Citing the United States Department of Health and Human Services' Bureau of Primary Health Care, two commenters suggested that southern border communities have a higher rate of communicable diseases, such as tuberculosis. The commenters suggested that biometric fingerprinting could exacerbate this incidence and create exposure to both the CBP officers working on the southern border and United States citizens living in the border communities. Another commenter raised similar health concerns regarding the US-VISIT process in the air and sea environment.

DHS is aware of these health concerns and believes that they are not influenced by US-VISIT. Tuberculosis is an airborne bacterial infection transmitted by air, and to become infected, an individual must usually be exposed to an infection source for an extended period in a closed environment. In 2005, 14,097 tuberculosis (TB) cases were reported to the Centers for Disease Control and Prevention (CDC) from the fifty states and the District of Columbia. CDC, *Reported Tuberculosis in the United States, 2005*, Sept. 2006, at 3, available at <http://www.cdc.gov/nchstp/tb/surv/surv2005/PDF/TBSurvFULLReport.pdf>. DHS believes that fingerprint scans do not impact the chances of transmitting tuberculosis, as the disease is spread through the air and transmission requires an extended period of contact with a person carrying it, not the short period of time required for enrollment. Similarly, there is no risk that US-VISIT contacts will cause contraction or transmission of viral haemorrhagic fevers (such as Ebola, Lassa, Marburg, Congo-Crimean), bioterrorism diseases (plague, anthrax, tularemia), bloodborne diseases (HIV, hepatitis B and C virus), soil-transmitted diseases (worms, dermatophytes, sporeforming bacteria), or vectorborne diseases (malaria, dengue, leishmaniasis, trypanosomiasis).

CBP officers clean the fingerscan machines periodically using lint-free wipes and rubbing alcohol to mitigate the public's legitimate health concerns. This periodic cleaning helps DHS capture better quality fingerscans on the first try and reduces inspection wait times.

Finally, the DHS Chief Medical Officer (CMO) oversees and coordinates all medical activities of DHS to ensure appropriate preparation for, and response to, incidents having medical significance. The DHS CMO also coordinates the biodefense activities of DHS, including its pandemic influenza portfolio, and ensures that DHS has a unified approach to medical preparedness. Accordingly, any medical direction from the DHS CMO will be implemented to prevent transmission of pathogens through US-VISIT.

#### *I. Program Exemptions*

DHS received many comments concerning the populations of aliens who were, or should be, included in US-VISIT. A few discussed issues that did not directly involve US-VISIT, such as extension of the time period per visit for holders of a B-1/B-2 visa or BCC, or more parity between Mexican and Canadian visitors. See 70 FR 52037 (Sept. 1, 2005) (Western Hemisphere Travel Initiative, ANPRM); 71 FR 46155 (Aug. 11, 2006) (same, NPRM); 71 FR 68412 (Nov. 24, 2006) (same; airports; Final Rule).

Four commenters expressed support for the Canadian exemption and requested it be made permanent, whereas one commenter suggested eliminating the exemption. Creating a permanent US-VISIT exemption for applicants for admission from Mexico and Canada, or for some other nationality, is inconsistent with the statutory obligations of DHS to create a complete biometric entry-exit system. Moreover, no regulatory provision dealing with security can be considered permanent—programmatic requirements and implementing regulatory requirements and limitations must be adjusted to respond as security requirements change. DOS security measures in the issuance of a BCC do not relieve DHS of its statutory obligations. However, DHS considers the impact of processing additional alien classifications in US-VISIT and attempts to minimize negative impacts prior to implementation. DHS understands the economic ramifications of transborder travel and commerce and will implement large-scale changes through technology and processes to minimize their overall impact.

Another commenter focused specifically on the northern border with Canada, stating that there is not, in writing, a permanent exemption for Canadians. The comment is correct. No nationality was ever planned to be permanently exempt from US-VISIT.

#### *J. Privacy*

Twelve commenters raised privacy concerns in the collection of US-VISIT information, although these comments were about varying specific points of the program. DHS is required to protect the privacy of the individuals from whom DHS collects information through the US-VISIT process in accordance with the Privacy Act, 5 U.S.C. 552a. As part of this responsibility, DHS has published a series of Privacy Impact Assessments (PIAs) to explain the program, changes to the program, risks that have been identified to privacy, and steps undertaken to mitigate that risk. The PIAs affecting US-VISIT list the principal users of the data within DHS and notes that the information may also be shared with other law enforcement agencies at the federal, state, local, foreign, or tribal level who, in accordance with their responsibilities, are lawfully engaged in collecting law enforcement intelligence information and/or investigating, prosecuting, enforcing, or implementing civil and/or criminal laws, related rules, regulations, or orders. DHS has made available several PIAs and revisions for the US-VISIT program and noted that availability on the public record. See 71 FR 42653 (July 27, 2006); 71 FR 3873 (Jan. 24, 2006); 70 FR 39300 (July 7, 2005); 70 FR 35110 (June 16, 2005); 70 FR 17857 (Apr. 7, 2005) (Advanced Passenger Information System); 69 FR 57036 (Sept. 23, 2004); 69 FR 2608 (Jan. 16, 2004). All of the assessments and revisions are available on the DHS Web site at <http://www.dhs.gov/us-visit>. DHS continually considers the impact of US-VISIT on privacy interests and updates its assessments as the program is developed.

Two comments raised the issue of "scope creep" or "mission creep," stating fears that the information collected in US-VISIT will be used for purposes not connected to the program. DHS believes that the PIAs, which identify the specific purposes for which the information is being collected, the intended use of the information, with whom the information will be shared, and how the information will be secured, protect the public from "mission creep." The PIA process is also a transparent one, with the public being able to access it and comment on it. As DHS further considers integrating

its border security databases, DHS will reassess the privacy impact of such integration, and the public will be invited to provide further comment.

One commenter stated, however, that the statements in the PIA on the purposes of information collection and to whom the information must be shared conflicted with the language of the August 31, 2004 interim rule, quoting that language where the interim rule stated:

the [collected] information may also be shared with other law enforcement agencies at the federal, state, local, foreign, or tribal level, who, in accordance with their responsibilities, are lawfully engaged in collecting law enforcement intelligence information and/or investigating, prosecuting, enforcing, or implementing civil and/or criminal laws, related rules, regulations, or orders.

69 FR at 53324. The relevant PIA, however, contains the same language (section 4, p. 7).

The commenter also suggested that the purposes for which the PIA states that the information is being collected conflicts with the sharing of the data with the FBI and other law enforcement agencies. One of the stated purposes of US-VISIT in the PIA is, however, to provide information on whether a person "should be apprehended or detained for law enforcement action." DHS believes that this purpose is not inconsistent with sharing data with law enforcement entities. DHS also published a revised PIA prior to the interim rule becoming effective on September 30, 2004. 69 FR 57036 (Sept. 23, 2004). Further, DHS published additional PIAs as necessary for additional steps in the program.

Finally, the commenter stated that DHS should recognize a right of judicial review for individuals adversely affected by US-VISIT. DHS has interpreted "adversely affected" to refer to inaccurate or incorrect information maintained by US-VISIT or a determination of inadmissibility. These situations have been excluded from judicial review per DHS and Department of Justice (DOJ) policy for many years, and the implementation of US-VISIT does not warrant reopening this issue. Moreover, a determination that the alien is inadmissible is reviewable only pursuant to other statutory and regulatory provisions. See, e.g., section 240 of the INA (8 U.S.C. 1229a) (removal proceedings to deciding inadmissibility).

If an individual believes that there is an error in the information contained in DHS systems and collected through the US-VISIT process, US-VISIT has provided a three-step redress process to



have records reviewed and amended or corrected based on accuracy, relevancy, timeliness, or completeness. This process includes confirming that mismatches and other errors are not retained as part of an alien's record. The first opportunity for data correction occurs at the port of entry where the CBP officer has the ability to correct manually most biographic-related errors, such as name, date of birth, flight information, and document errors. All of this process occurs without any action required by the individual.

If the individual still has questions about the travel record, he or she may contact the US-VISIT Privacy Officer. As of March 2007, US-VISIT's Privacy Office has received 175 requests for redress from the more than 78.5 million encounters through the US-VISIT process. The US-VISIT Privacy Officer will review the travel record, amend or correct it as necessary, and send a response to the traveler describing the action taken within 20 business days of receipt of the inquiry. If the individual is not satisfied with the action taken, he or she can appeal to the DHS Chief Privacy Officer, who will review the appeal, conduct an investigation, and make a final decision on the action to be taken. This redress policy is published on the DHS Web site at <http://www.dhs.gov/us-visit>. The US-VISIT Privacy Officer can also be contacted by e-mail at [usvisitprivacy@dhs.gov](mailto:usvisitprivacy@dhs.gov).

One commenter suggested that aliens sent to secondary inspection for purposes related to US-VISIT be included in a line separate and apart from those sent to secondary for any other purpose. Unfortunately, this comment cannot be adopted. At the time a traveler is sent to secondary, the CBP officer does not know definitively whether the reason is a mismatched fingerprint (false positive) or some other reason, such as a passport substitution. Initial studies have determined, however, that the incidence of a traveler being identified incorrectly as a "watchlist hit" by US-VISIT and being referred to secondary as a result is low, less than one-tenth of one percent.

Another commenter discussed the impact of "false hits" and the need to eliminate them. DHS is actively attempting to decrease the likelihood of a false match—where one alien is incorrectly matched to a watchlist hit—with frequent upgrades of our matching algorithms. Further, DHS is constantly seeking ways to reduce the incidence of false hits.

#### *K. Fees*

One commenter stated that it would be inappropriate for DHS to raise traveler fees to fund the US-VISIT program because the commenter believed that US-VISIT provides no direct benefit to the international traveler at the time of inspection. This comment misapprehends the source of funding for US-VISIT. US-VISIT is funded through appropriations. See Department of Homeland Security Appropriations Act, 2007, Public Law 109-295, tit. II, 120 Stat. 1355, 1357 (Oct. 4, 2006). The commenter is correct in citing one of the factors in determining whether a fee should be charged under the Chief Financial Officers Act, 31 U.S.C. 902(a)(8); the Independent Offices Appropriations Act, 1952, 31 U.S.C. 9701; and Office of Management and Budget Circular A-25, *User Charges* (Revised), section 6, 58 FR 38142 (July 15, 1993). DHS is not, however, considering establishing a fee to support funding of US-VISIT at this time, and the proposed rule did not suggest that such a fee was being considered.

#### **IV. Statutory and Regulatory Reviews**

##### *A. Regulatory Flexibility Act*

The Regulatory Flexibility Act (RFA) (5 U.S.C. 605(b)), as amended by the Small Business Regulatory Enforcement and Fairness Act of 1996 (SBREFA), requires an agency to prepare, and make available to the public, a regulatory flexibility analysis that describes the effect of the rule on small entities (i.e., small businesses, small organizations, and small governmental jurisdictions). DHS has considered the impact of this rule on small entities and certifies that this rule will not have a significant economic impact on a substantial number of small entities. The individual aliens to whom this rule applies are not small entities as that term is defined in 5 U.S.C. 601(6). There is no change expected in any process as a result of this rule that would have a direct effect, either positive or negative, on a small entity. Accordingly, this rule will not have a significant economic impact on a substantial number of small entities, and DHS does not believe that US-VISIT processing will impede the free flow of travel and trade, especially travel and trade related to small entities.

##### *B. Executive Order 12866—Regulatory Planning and Review*

Under section 3(f) of Executive Order 12866, "Regulatory Planning and Review" (58 FR 51735 (Sept. 30, 1993) (as amended), DHS has determined that this final rule is a "significant regulatory

action" because there is a significant public interest in issues pertaining to national security, immigration policy, and international travel and trade related to this final rule. Accordingly, this rule has been submitted to the Office of Management and Budget (OMB) for review and approval.

DHS currently processes through US-VISIT, using biometrics, all aliens entering the United States with a nonimmigrant visa or under the VWP at any air, sea, or land port of entry. US-VISIT biometric screening has resulted in the ability of DHS to take adverse action against more than 3800 aliens who posed a security threat to the United States or whose prior criminal actions rendered them ineligible for admission. This final rule will strengthen the ability of CBP officers to identify and take action against persons whose conduct renders them a security threat and therefore ineligible for admission. For example, DHS expects that, just as 3,382 nonimmigrants have been intercepted by DHS using the biometric screening of US-VISIT, additional individuals applying for admission with permanent resident cards or reentry permits will be found, through the comparison of biometric identifiers, to have violated the terms of their permanent resident status. Such violations may be the result of the commission of various crimes, tampering with the actual permanent resident card, or attempting to gain entry by assuming the identity of another LPR. Such violations could ultimately result in the loss of permanent resident status and possible removal from the United States or the exclusion or removal of an individual from the United States for fraud. Based on the number of permanent resident cards that are seized by CBP officers at ports of entry (approximately 15,000 in FY 2005) and the number of DHS Forensic Document Laboratory analyses each month (approximately 250), DHS estimates that US-VISIT biometric screening has the potential to identify a significant number of aliens each month in need of additional investigation prior to being admitted to the United States. In addition, based on the numbers of refugee travel documents (519) and immigrant visas (2,287) that CBP officers intercepted in attempts to use the documents fraudulently by aliens during FY 2005, US-VISIT estimates that interception of fraudulently used documents will increase with the introduction of biometric verification of identity.

DHS expects similar results—an increase in the number of aliens identified with possible admission-

related or immigration problems—by including the other groups of aliens highlighted in this final rule into the US-VISIT biometric screening protocol. For example, aliens holding immigrant visas have a six-month validity window from the date that the visa is issued to arrive in the United States. Events could occur during this time period that could result in the alien being found inadmissible to the United States, and such inadmissibility might only be discovered as the result of biometric comparisons. Over the last several years, over 365,000 aliens have entered the United States annually on immigrant visas.

Refugees and asylees—appearing before government officers in many instances without the benefit of even the most basic form of identity documentation—potentially pose a risk to public safety and security. In many instances, the United States Government is providing these individuals with a new identity. It is important to recognize that for refugees and asylees, US-VISIT will be verifying the identity of these aliens by comparing the biometrics collected at the time of an

application for admission to the United States with the biometrics that were already collected during the initial refugee or asylee adjudication process.

Similarly, aliens paroled into the United States warrant the additional screening derived by using US-VISIT. While the majority of these aliens have been screened overseas in order to determine whether a parole should be granted, it is in the security interests of the United States to verify that the individuals who arrive at the border are the same individuals originally screened for parole. Approximately 150,000 aliens are granted parole into the United States each year.

The costs associated with implementation of this final rule for select travelers not otherwise exempt from US-VISIT requirements include an increase of approximately 15 seconds in initial inspection processing time (additional biometric collection) per applicant over the current average inspection time. No significant difference is anticipated in the processing of an alien traveling with a visa or under the VWP, as compared to any other alien who is exempted from

the visa requirements. These ports of entry handle over 99% of all air and sea border traffic and over 95% of all land border traffic for these alien classifications. DHS, through CBP, has carefully monitored the impact of US-VISIT biometric data collection on the inspection of applicants for admission at air, sea, and land borders. At air and sea ports, internal studies have established that the biometric collection adds no more than 15 seconds on average to the inspection processing time at primary inspection. At land border ports, internal studies have shown positive results, and in some ports of entry the amount of time to process an alien for admission using the US-VISIT process was actually shorter than it had been previously due to the automation of data collection and implementation of a standard process. A close examination of the first three land ports of entry to begin US-VISIT biometric collection as part of admission found that the average processing time for applicants requiring a Form I-94 or Form I-94W actually decreased and sometimes resulted in significantly reduced processing times.

Port of entry	Average form I-94 processing time before implementing US-VISIT	Average form I-94 processing time after implementing US-VISIT
Port Huron, MI .....	11 minutes, 42 seconds .....	9 minutes, 58 seconds.
Douglas, AZ .....	4 minutes, 16 seconds .....	3 minutes, 12 seconds.
Laredo, TX .....	12 minutes, 10 seconds .....	2 minutes, 18 seconds.

Accordingly, DHS does not believe that US-VISIT processing impedes the free flow of travel and trade.

In addition, over time, the efficiency with which the process is employed will increase, and the process can be expected to further improve. DHS will not apply this rule to all aliens crossing land borders until technological advancements are identified, tested, and implemented to ensure that the land border commerce and traffic concerns are significantly mitigated. DHS may choose to implement this rule in the air and sea environment before the land border environment. As mentioned in the August 31, 2004, rule, DHS has developed a number of mitigation strategies, not unlike those already available to CBP under other conditions to mitigate delays. DHS, while not anticipating significant delays for travelers, will nevertheless develop procedures and strategies to deal with any significant delays that may occur through unanticipated and unusually heavy travel periods.

*C. Executive Order 13132—Federalism*

Executive Order 13132 requires DHS to develop a process to ensure “meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications.” Such policies are defined in the Executive Order to include rules that have “substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.”

DHS has analyzed this final rule in accordance with the principles and criteria in the Executive Order and has determined that this rule would not have a substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, DHS has determined that this rule does not have federalism implications. This rule codifies procedures for the collection by the federal government of biometric

identifiers from certain aliens seeking to enter or depart from the United States, for the purpose of improving the administration of federal immigration laws and for national security. States do not conduct activities with which the provisions of this specific rule would interfere.

*D. Unfunded Mandates Reform Act*

Section 202 of the Unfunded Mandates Reform Act of 1995 (UMRA), Public Law 104-4, 109 Stat. 48 (March 22, 1995) (2 U.S.C. 1501 et seq.), requires federal agencies to prepare a written assessment of the costs, benefits, and other effects of proposed or final rules that include a federal mandate likely to result in the expenditure by state, local, or tribal governments, in the aggregate, or by the private sector of more than \$100 million in any one year (adjusted for inflation with 1995 base year). Before promulgating a rule for which a written statement is needed, section 205 of the UMRA requires DHS to identify and consider a reasonable number of regulatory alternatives and to adopt the least costly, most cost-

effective, or least burdensome option that achieves the objective of the rule. Section 205 allows DHS to adopt an alternative, other than the least costly, most cost-effective, or least burdensome option if DHS publishes an explanation with the final rule. This final rule will not result in the expenditure, by state, local or tribal governments, or by the private sector, of more than \$100 million annually. Thus, DHS is not required to prepare a written assessment under the UMRA.

#### *E. Small Business Regulatory Enforcement Fairness Act*

This final rule is not a major rule as defined by section 251 of the Small Business Regulatory Enforcement Fairness Act of 1996, 5 U.S.C. 804, as this rule will not result in an annual effect on the economy of \$100 million or more.

#### *F. Trade Impact Assessment*

The Trade Agreement Act of 1979, Public Law 96–39, tit. IV, secs. 401–403, 93 Stat. 144, 242 (July 26, 1979), as amended (19 U.S.C. 2531–2533), prohibits federal agencies from engaging in any standards or related activities that create unnecessary obstacles to the foreign commerce of the United States. Legitimate domestic objectives, such as safety, are not considered unnecessary obstacles. The statute also requires consideration of international standards and, where appropriate, that they be the basis for United States standards. DHS has determined that this final rule will not create unnecessary obstacles to the foreign commerce of the United States and that any minimal impact on trade that may occur is legitimate in light of this rule's benefits for the national security and public safety interests of the United States. In addition, DHS notes that this effort considers and utilizes international standards concerning biometrics, and DHS will continue to consider these standards when monitoring and modifying the program.

#### *G. National Environmental Policy Act*

DHS is required to analyze the proposed actions contained in this final rule for purposes of complying with the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321 et seq., and Council on Environmental Quality (CEQ) regulations, 40 CFR parts 1501–1508. An agency is not required to prepare either an environmental impact statement (EIS) or environmental assessment (EA) under NEPA if in fact the proposed action falls within a categorical exclusion, and no extraordinary circumstances preclude

use of the categorical exclusion. 40 CFR 1508.4. DHS analyzed the interim final rule published on August 31, 2004, and concluded that there were no factors in the expansion of US–VISIT pursuant to this final rule that would limit the use of a categorical exclusion under 28 CFR part 61 App. C, as authorized under 6 U.S.C. 552(a). In the July 27, 2006 NPRM, DHS stated that it would analyze the environmental impacts to conduct the appropriate level of analysis in accordance with NEPA. DHS has done such an analysis and has concluded that there are no factors in the expansion of US–VISIT that would limit the use of a categorical exclusion, for similar reasons—that the impact to the land border ports of entry would be largely unnoticed since US–VISIT processing would take place in secondary inspection only. In addition, DHS will not implement US–VISIT processing at primary inspection locations at land border ports of entry without at least one additional round of notice and comment rulemaking. Since this final rule makes only minor changes to the existing regulations, and because DHS will not expand US–VISIT processing in the primary environment at land border ports of entry without additional notice and comment rulemaking, DHS finds that this final rule is also categorically excluded from further environmental documentation.

#### *H. Paperwork Reduction Act*

This final rule establishes the process by which DHS will require certain aliens who cross the borders of the United States to provide fingerprints, photograph(s), and potentially other biometric identifiers upon their arrival and departure at designated ports. These requirements constitute an information collection under the Paperwork Reduction Act (PRA), 44 U.S.C. 507 et seq. OMB, in accordance with the Paperwork Reduction Act, has previously approved this information collection for use. The OMB Control Number for this collection is 1600–0006.

Since this rule provides a mechanism for the addition of new aliens by Notice in the **Federal Register** who may be photographed and fingerprinted and who may be required to provide other biometric identifiers, DHS has submitted the required Paperwork Reduction Change Worksheet (OMB–83C) to OMB reflecting the increase in burden hours, and OMB has approved the changes.

#### *I. Public Privacy Interests*

As discussed in the January 5, 2004 (69 FR 468) and August 31, 2004 (69 FR

53318) interim final rules and the July 27, 2006 NPRM (71 FR 42605), US–VISIT records will be protected consistent with all applicable privacy laws and regulations. See also Parts II.K and III.E. Personal information will be kept secure and confidential and will not be discussed with, nor disclosed to, any person within or outside US–VISIT other than as authorized by law and as required for the performance of official duties. In addition, careful safeguards, including appropriate security controls, will ensure that the data are not used or accessed improperly. The DHS Chief Privacy Officer will review pertinent aspects of the program to ensure that these proper safeguards and security controls are in place. The information will also be protected in accordance with the DHS published privacy policy for US–VISIT. Affected persons will have a three-stage process for redress if there is concern about the accuracy of information. An individual may request a review or change, or a DHS officer may determine that an inaccuracy exists in a record. A DHS officer can modify the record. If the individual remains dissatisfied with this response, he or she can request assistance from the US–VISIT Privacy Officer and can ask that the DHS Privacy Officer review the record and address any remaining concerns.

The DHS Privacy Office will advise US–VISIT to further ensure that the information collected and stored in IDENT and other systems associated with US–VISIT is being properly protected under privacy laws and guidance. US–VISIT also has a program-dedicated Privacy Officer to handle specific inquiries and to provide additional advice concerning the program.

Finally, DHS will maintain secure computer systems that will ensure that the confidentiality of an individual's personal information is maintained. In doing so, DHS and its information technology personnel will comply with all laws and regulations applicable to government systems, such as the Federal Information Security Management Act of 2002, Title X, Public Law 107–296, 116 Stat. 2259–2273 (Nov. 25, 2002) (codified in scattered sections of titles 6, 10, 15, 40, and 44 U.S.C.); Information Management Technology Reform Act (Clinger-Cohen Act), 40 U.S.C. 11101 et seq.; Computer Security Act of 1987, 40 U.S.C. 1441 et seq. (as amended); Government Paperwork Elimination Act, 44 U.S.C. 101, 3504; and Electronic Freedom of Information Act of 1996, 5 U.S.C. 552.

**List of Subjects***8 CFR Part 215*

Administrative practice and procedure, Aliens, Travel restrictions.

*8 CFR Part 235*

Aliens, Immigration, Registration, Reporting and recordkeeping requirements.

■ Accordingly, chapter I of title 8 of the Code of Federal Regulations is amended as follows:

**PART 215—CONTROL OF ALIENS DEPARTING FROM THE UNITED STATES**

■ 1. The authority citation for part 215 continues to read as follows:

**Authority:** 8 U.S.C. 1104; 1184; 1185 (pursuant to E.O. 13323, published January 2, 2004), 1365a and note, 1379, 1731–32.

■ 2. Section 215.8 is amended by revising paragraph (a)(1) to read as follows:

**§ 215.8 Requirements for biometric identifiers from aliens on departure from the United States.**

(a)(1) The Secretary of Homeland Security, or his designee, may establish pilot programs at land border ports of entry, and at up to fifteen air or sea ports of entry, designated through notice in the **Federal Register**, through which the Secretary or his delegate may require an alien admitted to or paroled into the United States, other than aliens exempted under paragraph (a)(2) of this section or Canadian citizens under section 101(a)(15)(B) of the Act who were not otherwise required to present a visa or have been issued Form I–94 or Form I–95 upon arrival at the United States, who departs the United States from a designated port of entry, to provide fingerprints, photograph(s) or other specified biometric identifiers, documentation of his or her immigration status in the United States, and such other evidence as may be requested to determine the alien's identity and whether he or she has properly maintained his or her status while in the United States.

\* \* \* \* \*

**PART 235—INSPECTION OF PERSONS APPLYING FOR ADMISSION**

■ 3. The authority citation for part 235 continues to read as follows:

**Authority:** 8 U.S.C. 1101 and note, 1103, 1183, 1185 (pursuant to E.O. 13323 published on January 2, 2004), 1201, 1224, 1225, 1226, 1228, 1365a note, 1379, 1731–32.

■ 4. Section 235.1 is amended by revising paragraph (f)(1)(ii) to read as follows:

**§ 235.1 Scope of examination.**

\* \* \* \* \*

(f) \* \* \*

(1) \* \* \*

(ii) The Secretary of Homeland Security or his designee may require any alien seeking admission to or parole into the United States, other than aliens exempted under paragraph (f)(1)(iv) of this section or Canadian citizens under section 101(a)(15)(B) of the Act who are not otherwise required to present a visa or be issued Form I–94 or Form I–95 for admission or parole into the United States, to provide fingerprints, photograph(s) or other specified biometric identifiers, documentation of his or her immigration status in the United States, and such other evidence as may be requested to determine the alien's identity and whether he or she has properly maintained his or her status while in the United States. The failure of an applicant for admission to comply with any requirement to provide biometric identifiers may result in a determination that the alien is inadmissible under section 212(a) of the Immigration and Nationality Act or any other law.

\* \* \* \* \*

**Paul A. Schneider,**

*Deputy Secretary.*

[FR Doc. E8–30095 Filed 12–18–08; 8:45 am]

**BILLING CODE 9111–97–P**

**FEDERAL RESERVE SYSTEM****12 CFR Part 229**

[Regulation CC; Docket No. R–1344]

**Availability of Funds and Collection of Checks**

**AGENCY:** Board of Governors of the Federal Reserve System.

**ACTION:** Final rule; technical amendment.

**SUMMARY:** The Board of Governors (Board) is amending the routing number guide to next-day availability checks and local checks in Regulation CC to delete the reference to the head office of the Federal Reserve Bank of St. Louis and to reassign the Federal Reserve routing symbols currently listed under that office to the head office of the Federal Reserve Bank of Atlanta. These amendments reflect the restructuring of check-processing operations within the Federal Reserve System.

**DATES:** The final rule will become effective on February 21, 2009.

**FOR FURTHER INFORMATION CONTACT:**

Jeffrey S. H. Yeganeh, Financial Services Manager (202/728–5801), or Joseph P. Baressi, Financial Services Project Leader (202/452–3959), Division of Reserve Bank Operations and Payment Systems; or Sophia H. Allison, Senior Counsel (202/452–3565), Legal Division. For users of Telecommunications Devices for the Deaf (TDD) only, contact 202/263–4869.

**SUPPLEMENTARY INFORMATION:** Regulation CC establishes the maximum period a depository bank may wait between receiving a deposit and making the deposited funds available for withdrawal.<sup>1</sup> A depository bank generally must provide faster availability for funds deposited by a “local check” than by a “nonlocal check.” A check is considered local if it is payable by or at or through a bank located in the same Federal Reserve check-processing region as the depository bank.

Appendix A to Regulation CC contains a routing number guide that assists banks in identifying local and nonlocal banks and thereby determining the maximum permissible hold periods for most deposited checks. The appendix includes a list of each Federal Reserve check-processing office and the first four digits of the routing number, known as the Federal Reserve routing symbol, of each bank that is served by that office for check-processing purposes. Banks whose Federal Reserve routing symbols are grouped under the same office are in the same check-processing region and thus are local to one another.

On February 21, 2009, the Reserve Banks will transfer the check-processing operations of the head office of the Federal Reserve Bank of St. Louis to the head office of the Federal Reserve Bank of Atlanta. As a result of this change, some checks that are drawn on and deposited at banks located in the St. Louis and Atlanta check-processing regions and that currently are nonlocal checks will become local checks subject to faster availability schedules. To assist banks in identifying local and nonlocal checks and making funds availability decisions, the Board is amending the list of routing symbols in appendix A associated with the Federal Reserve Banks of St. Louis and Atlanta to reflect the transfer of check-processing operations from the head office of the

<sup>1</sup> For purposes of Regulation CC, the term “bank” refers to any depository institution, including commercial banks, savings institutions, and credit unions.